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No. 21964

IN THE

United States Court of Appeals

For the Ninth Circuit

LOREN FORD and FRANCES FORD, Husband and Wife, and DAVENPORT EQUIPMENT COMPANY, INC., a Washington corporation,

Appellants,

vs.

INTERNATIONAL HARVESTER COMPANY, a Delaware corporation,

Appellee.

No. 21964

FILED
DEC 26 1967
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BRIEF OF APPELLEE

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ROSS PRINTING COMPANY

DEC 27 1967

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ADDITIONAL STATEMENT OF THE CASE

In keeping with Appellant's brief we shall use the symbol "Tr." when referring to the Clerk's Transcript of Record and "R." when referring to the Court Reporter's Record of Proceedings.

Although the alleged promise to Ford in October of 1958

that no competing dealerships would be permitted included both the towns of Edwall and Harrington, the latter is not at issue because Ford withdrew his objection to the Kinzel motor truck contract at Harrington in 1959 (R. 88), and the farm equipment parts contract was cancelled May 1, 1962 (Def's. Ex. 117).

At the outset of negotiations in October, 1958 Harvester gave Ford a prospectus entitled "Sales and Profit Possibilities" (Plf's. Ex. 6) which contains the following at page 4:

> "Although the analysis is based upon a selected normal trade territory, International Harvester Company's Dealer Sales and Service Agreement does not assign exclusive trade territories to any particular dealer. Others in the selected normal trade territory will be competing for the customers' trade—competitive dealers in the same town as well as the IH and competitive dealers in other towns. Nor will your dealership be confined in selling in only the territory referred to in this analysis."

From January, 1959 until Ford terminated the dealership, the parties executed eleven written Dealer Sales and Service Agreements on forms generally used by Harvester and covering farm equipment and motor trucks. (Finding VIII, Tr. 46, Def's. Exs. 101 through 111). The basic dealership agreement (Def's. Ex. 101) is a very comprehensive instrument consisting of eighteen pages of printing arranged under thirty separate sections which set forth in great detail the relationship between the parties from the inception to termination.

Some further statement as to the manner in which Overman Howell operating as St. John Hardware & Implement Company expanded into Edwall might be of assistance to the Court. Howell bought property in Edwall in the spring of 1960 and opened up a branch operation without telling Harvester nor seeking their permission for the reason "We thought it was none of their business." (R. 269) He further testified that he would not have discontinued the Edwall operation if Harvester had requested him so to do. (R. 272) Ford testified that Harold Berry, District Manager at Spokane for Harvester, told him in early 1961 that Howell threatened to sue Harvester if they tried to put him out of Edwall (R. 101) to which Ford replied: "What the hell do you think I'll do?" (R. 101) In commenting on this conversation the court said (R. 359):

> "So right then he was informed they were not going to terminate St. John.
>
> "Now he had the opportunity at that time, or within three years thereof, to bring his action for damages . . ."

And on the following page (R. 360) the Court continued:

> "Oh, I think he pretty well knew right at that time, I can't draw any other conclusion, that they weren't going to terminate St. John, and the reason he knew it was that St. John had been an established dealership down in St. John and they were going to let him stay there. I think he knew that at that time. I don't think you could find anything else. There is where I have the problem. Right

then he had damage already, at that time, in 1961. He had been there, and he had been damaged, and thereafter he could bring his action any time within 3 years, couldn't he?"

Despite the fact that Ford knew in early 1961 that Harvester would not terminate the St. John operation, he continued to operate the Davenport dealership until the end of 1964.

ANSWER TO SPECIFICATION OF ERRORS

As pointed out in Appellant's brief, the sole question presented in his appeal is that of the Washington Statute of Limitations. The only Finding of Fact to which error is assigned is No. XV (Tr. 49). The Court found that the oral agreements between Harvester and Ford were breached no later than April of 1961 and under the 3-year statute of limitations any action was barred after April, 1964. This action was commenced in May, 1965 and both parties concede that the 3-year statute of limitations applies. The basis for the Court's finding that the breach occurred no later than April of 1961 is that the Dealer Sales and Service Agreements with the Edwall operation of St. John Hardware were approved under date of April, 1961, though dated February 6, 1961. (Def's. Exs. 112, 114, 115) Thus, assuming these agreements were not effective until April, 1961 and assuming that there could not be a breach of the oral agreements until an actual written dealership agreement was executed at Edwall, April, 1961 would be the latest date for

the commencement of the running of the statute of limitations. In reality, the statute commenced to run long before then. Ford testified he first learned of St. John's entry into Edwall in the fall of 1960. (R. 96) And, of course, he knew in early 1961 when he threatened Berry with suit that Harvester would not terminate the Edwall operation. (R. 101)

ARGUMENT IN ANSWER TO APPELLANT

Appellant's argument boils down to this: He had an oral agreement that Harvester would not permit a competing dealer to operate in Edwall while he was in Davenport. Even though this agreement was breached in early 1961, Ford could continue to operate at Davenport indefinitely but at any time he chose, even 20 years later, he could recover damages for the three years immediately preceding. We cannot conceive this to be the law for to follow such reasoning would destroy all statutes of limitation.

The universal rule is stated in 34 Am. Jur. 110, Section 137:

> "In accordance with the established rule already discussed, the statute of limitations begins to run in civil actions on contracts from the time the right of action accrues. This, ordinarily, is the time of the breach of the agreement, and not the time that actual damages are sustained as a consequence of the breach. The gist of the action is the breach, not the consequential damages which subsequently accrue; such damages are not the

result of a new or continuous breach, but relate back to the original one which gave the right of action and without which they could not exist . . ."

While we have no particular quarrel with the authorities cited and discussed in Appellant's brief, we fail to see their application here. For example, the quotations from Corpus Juris Secundum and from American Jurisprudence are taken from sections dealing with covenants in deeds such as the covenant for quiet enjoyment. And the two oil and gas cases discussed on page 13 of Appellant's brief deal with implied covenants and oil leases peculiar to the Oklahoma area, as the trial Court pointed out. (R. 363-5)

Nor are the cases of *United States vs. Fisher,* 112 Fed. Sup. 233 and *Aktiebolaget Bofors vs. United States,* 153 Fed. Sup. 397, at page 14 and 15 of Appellant's brief applicable. Each of these cases deals with a *series* of violations of an agreement, each of which gave rise to a cause of action. In the *Fisher* case each *sale* contrary to the price stabilization regulation was a separate offense and as each occurred a cause of action arose. In the *Bofors* case each separate *export* of guns constituted a separate cause of action. The Courts were not holding that there was a day-to-day breach of contract after the first breach occurred as the Appellant argues here. Furthermore, in each of the two cited cases the defendant was the actor which performed the act of selling that damaged the plaintiff. Here the sales that allegedly hurt Ford were those of the Edwall dealer.

Harvester breached the alleged agreement when the dealer was permitted into Edwall, but the subsequent sales by Edwall were not individual breaches of the agreement between Ford and Harvester. This alleged agreement could be breached only by permitting a dealer to come into the area. *This was the act that gave rise to a cause of action.* A new cause of action did not arise every day thereafter ad infinitum.

Nor are the Washington cases cited by Appellant of any great assistance. The case of *Austin vs. Wright,* 156 Wash. 24, 286 Pac. 48, turned on the fact there was a 20-year contract guaranteeing payment of annual dividends; each year a new cause of action arose if the dividends were not paid. The case of *Organ Company vs. First Methodist Episcopal Church,* 7 Wash. (2d) 310, 109 Pac. (2d) 798, involved an agreement in a contract that the buyer would keep an organ insured. The buyer didn't, but the seller didn't find this out until fire destroyed the organ. If the seller had known of the breach, the statute would have started running at that time. Then the situation would have been the same as that presented in *Sims vs. Salvey,* 234 S.W. (2d) 465 (Texas, 1950) where a husband breached a divorce agreement to pay premiums on a life insurance policy on his life. He permitted the policy to lapse in 1932 and died in 1948. Upon his death his former wife sought to recover for breach of the agreement. In the discussion on page 473 the Court pointed out that the agreement required the husband to deliver receipts to the wife when the premiums were paid.

Davis, 158 Wash. 556, 291 Pac. 711. Furthermore, Ford was damaged at the time the oral agreement was breached in 1961 as the Court pointed out (R. 360) quoted earlier in our brief. At that point he could have sued for an injunction and damages which would have been substantially less than the $100,000 sued for in this action. Instead, according to his theory, he had a right to continue to suffer damage and could bring an action at any particular point in time to recover the last 3 years thereof. Such accumulation of damages is not permitted. A similar situation was presented in *Kennedy vs. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043. There plaintiff was a distributor of the defendant and brought this action for damages he sustained during 8 months of operation because all of the calculators provided by the defendant were defective. The trial Court agreed with plaintiff and found what the damages were for 8 months but then cut them almost in two. The Supreme Court found the trial Court did so on the grounds that plaintiff should have mitigated his damages since he should have known at the end of 3 or 4 months that the calculators were all defective. On this point the Supreme Court said at page 240:

> "We have not the benefit of the trial court's reasons for concluding that the plaintiff was not entitled to all the sums which he apparently found in favor of plaintiff. We assume, however, that since the plaintiff had been engaged in selling what he contended to be a very defective and unsalable article for eight months, he should not be permited to allow the damages to accumulate to such

an extent, but should have been able to determine his rights in a much less time, or not to exceed one-half the time for which he claimed, and with this view we are inclined to concur with the lower court and to hold that his conclusion was justified but not his finding. A careful consideration of the facts convinces us that no greater sum is allowable, and his finding of fact is corrected to that sum. *This was not a contract for hire under which plaintiff was engaged, but was a selling agency to sell a certain thing in exclusive territory. Plaintiff was as well aware of the extent of defendant's failure to comply with its contract at the end of three or four months as he was at the end of eight months,* and we think the trial court was sufficiently liberal in his allowance." (Emphasis ours)

We fail to see the applicability of *Sterrett vs. North Fork Mining and Smelting Company,* 30 Wash. 164, 70 Pac. 266, or *Brisky vs. Leavenworth Logging,* 68 Wash. 386, 123 Pac. 519. These simply state that a cause of action arises when a tortious injury occurs. While *Trethewey vs. Green River Gorge, Inc.,* 17 Wash. (2d) 697, 136 Pac. (2d) 999, discussed at page 18 of Appellant's brief, involves a contract it was one for continuous employment. The Court found this to be an open account saying at page 719:

"However, as we have already indicated, the evidence shows and the court found, that if sufficient funds were not available to pay respondents' salary, under the terms of the agreement the unpaid amounts were to be carried forward on the books of the company, from year to year as a running account, against which were to be credited such amounts as were drawn by respondents from time to time. The contract of employment was for an indefinite

period, the services rendered thereunder by respondents were continuous, and the items of charge and credit were periodically entered each year; hence the statute of limitations did not begin to run until the services were terminated."

Assuming for the sake of argument that Ford had a "continuing contract" his cause of action arose when the first breach occurred. This question was squarely before the Court in *First Loan and Trust Co. vs. Schanche,* 202 N.W. Reporter, 390 (South Dakota), which involved a contract for continuing support. The Court said at page 391:

". . . It may be conceded that the contract is a continuing contract, and the question is: When does a right of action accrue on a continuing contract so as to set the statute of limitations in motion.

"In determining when the statute begins to run upon the breach of a continuing contract, the question depends largely upon the inquiry whether a complete right of action accrues at the time of the first breach. If a full recovery of damages can be had upon the first breach, the statute then begins to run; and when this right of action becomes barred plaintiff cannot recover for any subsequent breach though it accrues within the statutory period before action."

In the case at bar when the alleged oral agreement was breached in early 1961, Ford had a complete remedy by an action for an injunction and accrued damages.

In concluding this phase of our brief, we fail to see how

any of the authorities cited by Appellant support his unique theory of a continuing breach of contract.

ADDITIONAL REASONS FOR DENYING APPELLANT'S CLAIM

Parol Evidence Rule

There is another legal defense which should deny Appellant the right to recover in this action. His entire case is based on an alleged oral agreement with the Spokane District Manager of Appellee in the fall of 1958 to the effect that if he took over the Davenport dealership, the Appellee would not permit any International Harvester farm equipment dealership to operate in Edwall "in competition with plaintiff's." (Finding VI and VII, Tr. 45) Subsequently on January 16, 1959 the parties entered into the first of the eleven written dealership agreements. Parol or extrinsic evidence should not be received to explain, contradict, vary, alter, add to or subtract from the terms of written contracts which are as clear and explicit as those before us. A somewhat analogous situation was presented in *Gordon vs. Parke & Lacy Machinery Co.,* 10 Wash. 18, 38 Pac. 755. This involved a detailed written contract for the sale of a business and an alleged oral sideline agreement not to compete. In holding that the trial Court erred in considering testimony as to the oral agreement, the Court said at page 21:

> "Now the contract here to be considered was one of great detail, and entered minutely into all the matters undertaken by both parties, and was executed by both.

It covered the sale of the stock, accounts and lease of the place of business of the appellant in Spokane, with its furniture, fixtures and books. The complaint says that the respondent's purpose in making the purchase was to continue business in the same line theretofore followed by appellant, in Spokane, with the merchandise to be sold to him, and that the object of the agreement that appellant would no longer carry on business at that place was to prevent competition with him in the disposal of the goods acquired by him. If so, then, to the extent that the agreement referred to the goods which were the subject of the contract, it was certainly not collateral or independent, and we should expect to find some mention of the arrangement in a contract so precise in its terms and so formally drawn as this one. Not finding it there, the law concludes that the agreement alleged was not made, however much the appellant may have intended not to re-open business in Spokane."

The most recent application of the rule in a manufacturer-distributor case is *Henderson vs. Bardahl International Corp.*, 72 Wash. Dec. (2d) 106, Ocober 6, 1967 Advance Sheet where the defendant sought to prove an oral agreement wherein plaintiff, a distributor of defendant, waived part of his commissions. On this point the Court said at page 118:

"The oral agreement, which Bardahl offered to prove, was prior to the execution of the written commission agreement of January 22, 1959 on which this action is based. The agreement is complete in itself and not ambiguous; there is no claim of accident, mistake or fraud. The trial court properly refused to admit parol testimony to vary the written agreement."

The dealership agreements themselves contain no grant of exclusive territories nor any assurance of freedom from competition and Ford was so advised in the prospectus, "Sales and Profit Possibilities" (Plf's. Ex. 6). Clearly the alleged oral agreement contradicts, adds to or varies the terms of the written instruments. Not only are these extremely detailed, clear and unambiguous but each contains a "merger clause" entitled "Agreement Complete" typical of which is the following:

> "All understandings and agreements between the parties are contained in this agreement, which supersedes and terminates all previous agreements between the parties pertaining to the sale of the goods covered by this agreement. There are no oral or collateral agreements or understandings affecting this agreement."

The significance and conclusiveness of a "merger clause" has been recognized by the Washington Court in numerous cases. In *Buyken vs. Ertner,* 33 Wash. (2d) 334, 205 Pac. (2d) 628 (1949) the Court said at page 345:

> "While the three propositions suggested by Mr. Wigmore may properly have a place in determining whether or not a written contract embraces the entire agreement between the parties, they must nevertheless be considered in light of, and subject to, the principle to which this court is committed, namely, that where a written agreement *purports* to cover the entire subject matter with respect to which the parties are contracting, and fraud or mutual mistake is not claimed, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is inadmissible." (Emphasis the Court's)

And in *Victor Safe & Lock Co. vs. O'Neill,* 48 Wash. 176, 93 Pac. 214 (1908) the Court said at page 179:

> "Thus, the appellants solemnly said, over their own signatures, that the writing contains the whole contract between the parties, and that any further verbal agreements were waived."

To the same effect see 3 Williston on Contracts (rev. ed) 2281, 2282 Section 811A:

> "In most of the situations involving the application of a merger clause the presence of the clause is only an additional reason for reaching the same result that would be reached without it on the basis of the parol evidence rule . . ."

Nor can it be said that the alleged oral agreement was an independent, collateral contract for if the collateral agreement could reasonably be expected to be embodied in the written agreement, then the rule excludes evidence thereof. In the recent case of *Shelton vs. Fowler,* 69 Wash. (2d) 85, 417 Pac. (2d) 350, (1966) the Court, after noting that the contract before it had a merger clause and pointing out that the written instruments all contained very specifically detailed promises by both parties which were the consideration, applied the rule at page 95:

> "In the present case, the parol evidence rule is applicable because the alleged agreements to improve the roads could reasonably be expected to be embodied in these particular instruments. The alleged promises were

claimed to be part of the consideration to be given by the seller to the purchasers in connection with the sales."

If there were a contemporaneous oral agreement to the effect that Harvester would not permit a dealership at Edwall it certainly was not distinct from and independent of the written dealership agreements. On the contrary, such an oral agreement would be an integral and major covenant or condition thereof.

Although the trial Court found that there was an oral agreement as alleged by Appellant, it concluded: "The 'parol evidence rule' does not apply to these oral agreements because they do not violate the terms of the written dealership agreements between Plaintiffs and the Defendant." (Finding XIII, Tr. 49, and Conclusion II, Tr. 50) But this applies the wrong test. The question is not whether an oral agreement "violates" a written agreement—the question is does it contradict, subtract from, add to or vary the terms of the writing.

In addition to holding that the action was barred by the Statute of Limitations, we respectfully submit that the trial Court should have concluded the testimony as to the alleged oral agreement was not admissible under the parol evidence rule.

Dealership and Exclusive Agency Cases

In addition to the reasons given above for denying relief to Appellant, there is a large body of case law which denies recovery to dealers under circumstances similar to the case at bar. Dealership agreements in general, including the ones at issue here, are illusory in that they are terminable at the will of either party or on comparatively short notice without cause and no specific amount of goods are involved, that is, the dealer is not obliged to buy any certain amount of the manufacturer's products nor is he obliged to handle the manufacturer's line exclusively. An example is the case of *Curtiss Candy Co. vs. Silberman,* 45 Fed. (2d) 451 which was a suit by a dealer to enforce a territorial agreement. The Court held this promise was no more enforceable than the dealership agreement itself which was terminable at will and imposed no obligation on the dealer to make any specific amount of purchases from the manufacturer. In that case the Court pointed out also that: "It does not appear that plaintiffs could have made the sales either to the other jobbers, or to the retailers to whom they sold, had the defendant not violated its agreement before revocation."

In denying a dealer damages in a suit against the manufacturer for breach of a franchise to sell shoes in a particular city, the Court in *International Shoe Company vs. Carmichael,* 114 Southern (2d) 436, held that even though the manufacturer was notified but refused to stop sales by a competitor, the manufacturer was not responsible for sales

by the competitor and any damages did not result from any breach of the alleged agreement. In the instant case Harvester is not responsible for the sales made by St. John Hardware at its branch store in Edwall, and any damages allegedly suffered by Ford were not the proximate result of Harvester's entering into a written dealership with St. John Hardware several months after it actually opened for business in Edwall. *St. John could have done business at Edwall without a dealership agreement indefinitely.*

In *Ford Motor Co. vs. Kirkmyer Motor Co.*, 65 Fed. (2d) 1001, the Court denied damages to a dealer for breach of an oral promise not to set up a competing dealership on grounds that the written dealership agreement was for an indefinite time, terminable by either party on written notice, and therefore too illusory to support an action for damages. The Court pointed out that if the manufacturer had abided by the oral agreement and given the dealer the second dealership instead of giving it to a third party, the manufacturer could have turned around and terminated the dealership by written notice and the dealer would have no recourse. In our own case, if there were an oral agreement by Harvester not to place another dealership at Edwall, but if in fact Harvster wished to do so, it could have terminated Ford at Davenport and then set up a new dealership at Edwall and there would be nothing Ford could do about it. For analogous situations see also *Bushwick-Decatur Motors, Inc., vs. Ford Motor Co.*, 116 Fed. (2d) 675; and *A.B.C.*

Packard, Inc. vs. General Motors Corp., 275 Fed. (2d) 63 which was decided by this Court in 1960.

The trial Court recognized the illusory nature of the dealership agreement in Conclusion of Law III (Tr. 51). One of our defenses at trial was the Statute of Frauds—the oral agreement was not to be performed within one year. The Court disposed of that defense in Conclusion III by reference to a Washington case ". . . and the fact that the dealership agreements between plaintiffs and the defendant herein were terminable by either party on 30-days notice."

Damages

Some passing reference must be made to Appellant's alleged damages in view of the fact that the Court found (Finding XVI, Tr. 49) that but for the statute of limitations plaintiff would be entitled to $39,300 damages of which $28,800 represented salary for 3 years, 1962, 1963 and 1964, at $800 per month. This portion of the Finding reads as follows: "In such event the Court would conclude that a reasonable salary would be $800 per month, basing its conclusion on a prospectus, Plaintiff's Exhibit No. 6, entitled 'Sales and Profit Possibilities', which among other things purported to show that a dealer should make a profit of $10,000 per year on a gross business of $250,000, a sales figure that Mr. Ford would have reached if it had not been for the competition of St. John Hardware Company at Edwall and that of Kinzel at Harrington." (Parenthetically

there is no mention of $800 per month salary in the prospectus and the only testimony was that of Ford who stated he paid himself $600 per month in 1959 and 1960, $450 per month in 1961 and a total of $400 in 1962. (R. 143-4))

Even a cursory reading of the prospectus shows that it is neither a promise nor a representation of fact. The Court itself practically ignored the prospectus saying at one point (Tr. 189) while defense counsel was cross-examining Mr. Ford:

> "THE COURT: Is there any contention here that the prospectus is a part of the proceedings, so far as any representations made in it? I don't think there is. If there is, I wouldn't go along with that, because a prospectus is just what it is. I know what a prospectus is, and I don't think it would be any part of an agreement that you give a person."

Thus the Court itself has cut the ground out from underneath any finding of damages based on the prospectus. Furthermore, on the basis of *Kennedy vs. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043, previously discussed and as noted by the Court the dealership was terminable by either party on 30 days' notice, Appellant should not be permitted to pile up his damages after the alleged oral agreement was breached in early 1961.

CONCLUSION

We respectfully submit that the dismissal of the action should be affirmed for the reason it is barred by the Statute of Limitations and for the additional reason that proof of the oral agreement is barred by the Parol Evidence Rule and the additional reasons set forth herein.

Respectfully submitted,

DAVIS, TREZONA, CHASTEK & LORENZ

By .....

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Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

.....

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Attorney for Appellee

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BRIEF FOR THE APPELLANT, LOREN FORD, ET UX, ET AL.

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JURISDICTIONAL STATEMENT

Jurisdiction existed in the District Court by virtue of 28 U.S.C. § 1332(a) (1).

The Amended Complaint of Loren Ford and Frances Ford, husband and wife, and Davenport Equipment Company, Inc., a Washington Corporation, against International Harvester Company, a New Jersey Corporation alleged jurisdiction by reason of the matter in controversy exceeding the sum of $10,000.00 exclusive of interest and costs and in the controversy being between citizens of different states. (Tr. 6). The Answer of International Harvester Company admitted the aforesaid allegations (Tr. 10). In the Pre-Trial Order both parties admitted that the matter in controversy exceeded the sum of $10,000.00 and that the parties were citizens of different states (Tr. 24-25).

On April 19, 1967, Judgment was entered dismissing the action with prejudice. Timely Notice of Appeal was filed on May 17, 1967, by the Appellants.

Jurisdiction for this appeal rests on 28 U.S.C. §1291.

Throughout this brief "Tr." refers to the clerk's Transcript of Record and "R." refers to the court reporter's Record of Proceedings. The Plaintiffs and Appellants are sometimes herein referred to as "Ford." The defendant and Appellee International Harvester Company, a New Jersey Corporation, is sometimes referred to herein as "Harvester."

STATEMENT OF THE CASE

For 18 years prior to October of 1958 Loren Ford had been engaged in various capacities in the farm equipment business with experience in all phases of the farm equipment business. All of this experience was as an officer and member of the management force of International Harvester Dealerships or as an International Harvester Dealer himself. Ford's initial experience was with a large Harvester dealer in Hawaii where he worked his way up to general manager. After the War, Ford himself operated as an International Harvester dealer in Stanwood, Washington, and thereafter was General Manager of an International Harvester dealership in The Dalles, Oregon. Due to a change of ownership in The Dalles, Oregon, Harvester dealership Ford became interested in other employment. At this time he was offered a position as sales manager with the Massey Ferguson Company in Portland, Oregon, having jurisdiction over the states of Oregon, Washington, northern Idaho and western Montana, with supervision over 16 zone managers and the entire service department (R. 48).

In October of 1958 Clyde Wells was the district manager for the Spokane District of International Harvester having jurisdiction over all dealers in Eastern Washington, Northern Idaho and Western Montana. As district manager, Wells had the authority to sign dealers in the subject area and likewise to terminate dealers. (Wells' deposition, page 6). Wells previously knew Ford and regarded Ford as an experienced farm equipment dealer

with good qualifications. (Wells' deposition, pages 8-9). Included in Wells' jurisdiction were the towns of Davenport, Washington, Edwall, Washington, Harrington, Washington and Odessa, Washington.

Prior to October of 1958 the Harvester dealership in Davenport, Washington, was held by one Fred Denson doing business as Denson Hardware. The Denson operation in Davenport, Washington was not successful so far as the sale of Harvester farm equipment was concerned and Wells was interested in having someone who was more aggressive as the Harvester dealer in Davenport, Washington (Wells' deposition page 9-10).

In the early part of October of 1958, Ford and Wells had a telephone conversation concerning Harvester dealership possibilities in the Spokane district and area. Wells suggested that Ford come to Spokane to look into these possibilities. (R 48). Later in October, 1958, Ford came to Spokane, and discussed the Harvester dealership possibilities in the Inland Empire area with Wells and Howard Gabriel who was a zone manager for the Harvester company. Upon Ford's arrival in Spokane he had preliminary discussion with Wells and then was taken on a trip throughout the Spokane area by Mr. Gabriel. (R51-53). This included trips to Rosalia, Washington, Edwall, Washington, Harrington, Washington, and Davenport, Washington.

On the following day, Ford had further discussions with Wells in Spokane at which time Wells informed Ford

that if Ford purchased the Harvester dealership in Davenport, Washington, that the Harvester Company would not permit any Harvester dealership to operate in Edwall, Washington, 23 miles away from Davenport, Washington, *in competition with the dealership of Ford, so long as Ford was operating an International Harvester dealership in Davenport, Washington (Finding of Fact VI, Tr. 46).* During the same discussions Wells advised Ford that the International Harvester dealership at Harrington, Washington, was in the process of termination and that if Ford purchased the Harvester dealership in Davenport, Washington, that the Harvester Company would not permit a Harvester dealership to operate in Harrington, Washington in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington. (Finding of Fact VII, Tr. 46). At the time of the agreement between Wells and Ford the Harrington dealership was on a "collect on delivery" basis and Wells informed Ford that said dealership would be shortly terminated. (Tr. 46).

Relying upon Wells' promise that Harvester would not permit a Harvester dealership to operate in Edwall, Washington, or Harrington, Washington, in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington, Ford negotiated with Denson for the purchase of Denson's operation in Davenport, Washington, (R. 69), and turned down the Massey Ferguson offer. The negotiations by Ford with

Denson reached fruition in November of 1958. Ford purchased all of the assets of Denson's Hardware for $20,000.00 and in January of 1959 formed the Davenport Equipment Company, Inc., and commenced operations in Davenport as an International Harvester dealer. In purchasing the Davenport dealership Ford relied upon the promises of Wells that Harvester would not allow another Harvester dealer to operate in Edwall, Washington or Harrington, Washington in competition with Ford so long as Ford was operating a Harvester dealership in Davenport, as it was agreed by all parties that a successful Harvester dealership could not be operated in Davenport in competition with other Harvester dealers in Edwall, Washington, and Harrington, Washington. (Tr. 46). Ford's operation of the Harvester dealership in Davenport was successful until 1961.

St. John Hardware & Implement Company was the International Harvester dealer in St. John, Washington. In March of 1960 St. John Hardware & Implement Company purchased a building in Edwall, Washington and commenced doing business as a Harvester dealer in the Fall of 1960. (Tr. 47). On February 6, 1961, International Harvester Company entered into a dealership agreement with St. John Hardware & Implement Company providing for the operation by St. John Hardware & Implement Company of a Harvester dealership in Edwall, Washington. (Tr. 47). St. John Hardware was able to undersell Ford because of the volume generated by its two dealerships. Ford lost a

considerable number of sales to the new Edwall dealership and also lost service work for farmers in the Edwall area who took their work to St. John Hardware in Edwall due to the proximity thereof. (Tr. 49). Ford's sales dropped substantially after the commencement of operations in Edwall by St. John Hardware.

On January 6, 1961, Clyde Wells was replaced by Harold Berry as the district manager for the Harvester Company. Berry stated that when he replaced Wells as District Manager Berry walked in, Wells walked out, and there was no discussion between them concerning the dealerships in the Spokane District. (Berry deposition page 11.) Within a few days thereafter Ford went to the office of Berry and complained about the St. John Hardware operation in Edwall, Washington. (Tr. 48). At this time Berry informed him, Ford, he knew nothing of the promise of Wells and requested Ford to write him a letter concerning the facts and circumstances. On January 20, 1961, Ford wrote such a letter to Berry setting forth his complaints. (Defendant's Exhibit No. 123). Ford received no response to his letter. (R. 100). Thereafter Ford complained to the various zone managers concerning the operation in Edwall, Washington.

Prior to Wells' transfer, a meeting was held between Ford, W. C. Raugust, a successful Harvester dealer in Odessa, Washington, and the district manager. At this meeting both Raugust and Ford complained concerning the operation in Harrington, Washington, and likewise Ford complained concerning the operation in Edwall,

Washington. Mr. Raugust testified that the district manager did nothing but attempt to evade the issue. (R. 117). On March 15, 1961, Mr. Raugust, a long time State Senator in the State of Washington, wrote the Harvester Company a letter from Olympia, Washington. (Exhibit 131). This letter once again set forth Mr. Raugust's summary of the situation in Edwall and Harrington, Washington, and called attention to the promises made to Ford. He received no reply to this letter. (R. 118).

On December 19, 1963, Ford wrote another letter to the Harvester Company demanding termination of the operations at Edwall, Washington and Harrington, Washington. (Defendant's Exhibit No. 124). This letter was not answered by the Harvester Company. (R. 143).

In February of 1964, Ford wrote Berry, the district manager for Harvester, advising him that he had started the process of liquidating the Davenport Equipment Company due to the breach by Harvester of its agreement. On November 30, 1964, Ford wrote Berry a further letter advising that the liquidation was substantially completed and requesting cancellation of plaintiff's dealership agreements with Harvester effective December 7, 1964. (Defendant's Exhibit No. 126).

For three years immediately prior to the termination of the Ford's Harvester dealership in Davenport, Ford was unable to take any salary whatsoever from the Harvester dealership due to the competition in the Edwall area by

St. John Hardware. (Tr. 49-50). The Court found a reasonable salary to be $800.00 per month, $9,600.00 per year or a total of $28,800.00. The Court further found that a reasonable return on Ford's investment of $40,000.00 would be 6% per year which for a total of three years immediately prior to the termination amounted to $7,200.00. The Court likewise found that Ford's loss on his capital investment amounted to $3,300.00. (Finding of Fact XVI. Tr. 50).

In the trial of this action the Court found that the allegations of Ford concerning the promises made by Harvester were true and that Harvester had in fact promised Ford that it (Harvester) would not allow a Harvester dealership to operate in Edwall, Washington, in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington. (Tr. 46).

The Court further found that Harvester had failed to comply with said agreement with Ford by allowing St. John Hardware & Implement Company to operate a Harvester Dealership in Edwall, Washington in competition with Ford's Harvester dealership. The Court further found that Ford had been damaged in the sum of $39,300.00 by reason of said failures during the three years immediately preceding the commencement of the action by Ford.

Ford contended that the promise by Harvester that "Harvester would not permit any International Farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating an Inter-

national Harvester dealership in Davenport was a continuing covenant and that each day that Harvester allowed St. John Hardware to operate a dealership in Edwall in competition with Ford constituted a continuing breach of said covenant and as such the Plaintiffs could properly recover damages for the three years immediately preceding the commencement of this action. The Court held that the Washington Statute of Limitations commenced running as soon as St. John Hardware & Implement Company commenced operations in Edwall, Washington and that therefore, this action which was commenced in May of 1965 was barred by the Statute of Limitations. Ford contended that he was entitled to recover damages for three years immediately preceding the commencement of the action as the promise of Harvester was a continuing covenant and that Harvester's actions in allowing St. John Hardware to operate in Edwall in competition with Ford constituted a continuing breach of said continuing covenant. The Court entered a Judgment of Dismissal based upon the Statute of Limitations and this Appeal followed.

SPECIFICATIONS OF ERROR

The District Court erred in:

1. Failing to find that the promises made by International Harvester Company to Ford that Harvester would not permit a Harvester dealership in Edwall, Washington, or Harrington, Washington in competition with Ford so

long as Ford was operating an International dealership in Davenport, Washington constituted a continuing covenant and promise ;

2. Failing to find that Harvester's action in allowing St. John Hardware to operate in competition with Ford in Edwall, Washington, constituted a continuing breach of the aforesaid promise;

3. Failing to find that the breaches of International Harvester Company being continuing breaches, gave rise to an action for damages for the three years immediately preceding the commencement of this action;

4. In failing to conclude that the Washington Statutes of Limitations did not preclude or bar an action for damages for the continuing breaches by Harvester during the three year period immediately preceding the commencement of this action;

5. In entering Finding of Fact number XV (Tr. 49) that the Washington Statute of Limitations barred an action by Ford which was brought more than three years after the initial commencement of operations by St. John Hardware Company in Edwall, Washington;

6. Entering Conclusion of Law number VI (Tr. 51) which concluded that Ford's action was barred by the Statute of Limitations;

7. Entering judgment against Ford dismissing this action with prejudice. (Tr. 52).

ARGUMENT

The sole question presented in this Appeal is that of the Statute of Limitations.

The District Court specifically found as follows: "It was orally agreed between Mr. Ford and Mr. Wells that defendant (Harvester) would not permit any International Harvester farm equipment dealership to operate in Edwall, 23 miles away from Davenport, in competition with the plaintiffs (Ford) *so long as the plaintiffs (Ford) were operating an International Harvester Dealership in Davenport*". (Emphasis supplied). (Tr. 46). It is the contention of the Appellant, Ford, that this promise as found by the Court obligated Harvester to prevent competition by another Harvester dealer in Edwall throughout the entire term of Ford's operation of the Harvester dealership in Davenport. Likewise, it is the contention of the Appellant, Ford, that each day that Harvester permitted St. John Hardware to operate in Edwall, Washington, in competition with Ford constituted a continuing breach of Harvester's covenant with Ford. As such it is the contention of Ford that the covenant in question was a continuing covenant and that likewise that each day that the competition existed the covenant in question was breached. To hold otherwise would be to say that in the event Harvester allowed St. John Hardware to operate for one month in Edwall, then

terminated said operation for three years and then allowed St. John Hardware to resume competition with Ford would prevent the enforcement of the covenant as found by the Court. It is submitted that the important distinction is that the promise of Harvester as made by the Court was not to the effect that Harvester would not sign a contract with a dealer in Edwall, but to the contrary it was specifically found that the promise of Harvester was that it would not allow a Harvester dealer to operate in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport. It is earnestly submitted that such a covenant constitutes a continuing covenant.

In 54 C.J.S. ¶ 151, p. 94, we find the following discussion concerning continuing covenants and limitations of actions:

> "The right of action for a breach of a continuing covenant accrues from day to day as long as the breach continues, and any claim for a breach back of the statutory period within which action may be brought is barred, *but the fact that a portion of the claim is barred by the Statute of Limitations will not prevent a recovery for the part which has not become barred by the time suit is filed.*" (Emphasis supplied.)

In 34 Am. Jur. ¶ 137 at p. 111 a similar rule is recognized, as follows:

> "The right of action for breach of a continuing covenant accrues from day to day as long as the failure continues, *and the fact that a portion of the claim on account of such breach is barred by the Statute of Limitations will not prevent a recovery for the part which has not become barred at the time suit is filed.*" (Emphasis supplied)

In *Bowman v. Oklahoma Natural Gas Co.*, 385 Pac. (2d) 440 at p. 447 the Court quotes from C.J.S. and Am. Jur. as hereinabove cited and states as follows:

> "The right of action for a breach of a continuing covenant accrues from day to day as long as the breach continues."

The case of *Indian Territory Illuminating Oil Company vs. Rosamond*, 120 Pac. (2d) 349, is a case similar to the instant case in that a continuing covenant and a continuing breach was involved. In said case the action was based upon an implied covenant by the lessee of an oil well to protect the well in question from drainage from surrounding wells. In an action by the lessor to recover damages for failure of the lessee to protect the well from drainage during the term of the lease, the lessee contended that the Statute of Limitations commenced to run against the action at the time of the Lessee's first failure to protect the well from drainage. The Court denied this contention and at page 352 stated as follows:

> "The implied covenant of the lease, that the lessee will protect the land from drainage by adjoining wells so long as the drilling of a protection well or wells will, in the judgment of the reasonably prudent operator, be a profitable undertaking, is a continuing covenant, the obligation resting upon the lessee during the existence of the lease or as long as his ownership thereof continues—the implied covenant being a continuous covenant, the right to maintain an action for its breach continues so long as the breach continues and plaintiff is damaged thereby—the rule is that a breach of a continuing covenant gives rise to a cause of action each

> day the breach continues, and any claim for a breach back of the statutory period within which the action may be brought is barred."
>
> "The reason for the rule is that while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach but accrues when the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing."

The attention of the Court is called to the fact that in the foregoing cases we find language almost identical to the language in the promise found to have been made in the instant claim, that is, "as long as".

The general rule is that if violations are continuous, limitations never run while acts which commence the statutory period continued to occur. See *United States v. Fisher,* 112 F. Supp. 233 at p. 235. In the instant case it is submitted that the allowing of St. John Hardware to operate in Edwall, Washington, in competition with Ford constituted a continuous breach of Harvester's promise not to allow such competition so long as Ford was operating in Davenport, Washington.

The case of *Aktiebolaget Bofors v. United States,* 153 Fed. Supp. 397 is illustrative of a continuous breach situation. This action involved a contract entered into by United

States Government in 1941 whereby the inventor of the Bofors gun licensed the United States to "make, use and have made in the United States" a 40 millimeter anti-aircraft gun which the plaintiff had developed. The contract contained an agreement on the part of the United States not to export such guns and thus compete with the plaintiff's interest in selling guns or licenses to manufacture them to other countries. Beginning in 1942 the United States commenced exporting the guns and continued the exporting until shortly prior to the commencement of the action on May 15, 1953. The government contended that the cause of action was barred by the six year statute of limitations in that the contract was breached in 1942 at the time the United States commenced exporting the guns. At page 399 the Court stated as follows:

> "The agreement not to export, if we conclude that there was such an agreement, was without limit of time, and each act of violation, whenever it occurred, would constitute a violation of the agreement. There would be no way to measure, at any given time, the total damages which might result from violations then passed and those which might occur in the future and thus include them all in one suit."

As such the Court held that the action could properly be brought for damages for exports by the United States Government during the six year period immediately prior to the commencement of the action. It is submitted that the same situation exists in the instant case in that each day that Harvester allowed St. John Hardware to operate in Edwall in

competition with the plaintiff Ford, the agreement between Harvester and Ford was breached.

The Courts in the State of Washington, have, for many years last past, recognized the theory of continuing contracts and the doctrine contended for by the appellant herein. In *Austin v. Wright*, 156 Wash. 24, 286 P. 48, the plaintiff Austin brought an action based upon a written guarantee of the payment of annual dividends on certain stock "until such date as the same is redeemed by said corporation—". The action was brought more than six years after the first dividends were due but unpaid. The Court denied this contention and held that the contract was a continuing one and stated as follows:

> It is urged that the action is barred by the Statute of Limitations, but this is a continuing contract to be effective until the preferred stock should be redeemed by the corporation which issued it, and the trial court properly limited the recovery to a period of six years preceding the commencement of the action."

In the instant case it is submitted that International Harvester Company was under a continuing obligation not to permit a Harvester dealer to operate in Edwall, Washington, in competition with the Plaintiff, "so long as Plaintiff were operating an International Harvester dealership in Davenport." Such an agreement would clearly seem to be a continuing agreement which obligated Harvester to refrain from allowing a Harvester dealer to compete in Edwall, Washington, at any time during the plaintiff Ford's operation of the dealership in Davenport, Washington.

The doctrine of a continuing covenant was likewise recognized by the Washington State Supreme Court in *Reuter Organ Company v. First Methodist Episcopal Church*, 7 Wn. (2d) 310, 109 P. (2d) 798. In this action the Reuter Organ Company sold an organ to the defendant First Methodist Church. The conditional sales contract contained an agreement on the part of the church that the church would keep the organ fully insured until the purchase price was paid in full. The contract was dated April 5, 1929. On June 1, 1938, the organ was completely destroyed by fire and thereafter the organ company brought an action against the church for failure of the church to keep the organ insured. The church defended the action contending that it had breached its agreement to insure the organ more than six years prior to the commencement of the action. At page 324 the Court, in denying the contention of the church, stated as follows:

> "Such an action is not barred by the Statute of Limitations, as the organ remained respondent's property, and was in the possession of appellant, under the contract of conditional sale, which contained a *continuing covenant* on the part of appellant to keep the organ protected by insurance." (Emphasis supplied.)

CONTINUING BREACH OF COVENANT

The Courts of the State of Washington have long recognized the doctrine of continuous breach. Starting with the case of *Doran v. Seattle*, 24 Wash. 182, 64 Pac. 230, the Court has in various circumstances recognized continuous breaches. In the Doran case, *supra*, the Court held that

where the defendant City constructed a bulkhead on the plaintiff's property which damaged the plaintiff's house, such a wrong was a continuing wrong and that the Statute of Limitations did not commence to run from the date of the construction of the bulkhead but rather continued so long as the nuisance continued.

In *Sterrett v. North Fork Mining and Smelting Company,* 30 Wash. 164, 70 Pac. 266, the Court held that the damage to the plaintiff's property by reason of fumes emitted from the defendant's mill constituted a continuing wrong and that the property owner could properly recover damages for the statutory two year period preceding the commencement of the action even though the initial wrong took place many years prior thereto. To the same effect is *Brisky v. Leavenworth Logging,* 68 Wash. 386, 123 Pac. 519.

The Courts of the State of Washington have likewise recognized continuing contracts of employment. In *Trethewey v. Green River Gorge, Inc.,* 17 Wn. (2d) 697, 136 P. (2d) 999, the Court held that where a contract of employment was for an indefinite period and the services rendered by the servant were continuous that the Statute of Limitations did not begin to run until the services were terminated.

The rule in the State of Washington likewise is that a cause of action for damages does not accrue until the damages occasioned by the wrong occur. In *Theurer v. Condon,* 34 Wn. (2d) 448, 209 P. (2d) 311, the plaintiff brought an action for damages to an apartment house owned by the

plaintiffs, which damages were caused by a fire which the plaintiffs contend was proximately caused by the defendant's negligence in installing an oil supply tank and an oil burning device. The oil burner was installed in 1937 and the fire occurred in 1944 causing the damage in question. The defendant's contended that since the action was based upon the negligent installation of the oil burner that the Statute of Limitations accrued at the time of the installation of the oil burner and that therefore the action for damages was barred. In denying the claim of the bar of the Statute of Limitations as set forth by the defendants the Court at page 454 stated as follows:

> "This Court has several times decided questions in connection with the date when a Statute of Limitations commenced to run in cases somewhat analagous to the case at bar—the bar of the Statute of Limitations as to the respondent's right of action, did not commence to run as to damages occasioned by the fire until the date of the fire, November 6, 1944."

THE STATUTE OF LIMITATIONS AS A DEFENSE

The Courts attention is called to the following Washington cases concerning the imposition of the defense of the Statute of Limitations.

In *Paul v. Kohler*, 82 Wash. 257, 144 Pac. 64, the Court stated as follows:

> "While the plea of the Statue of Limitations is not now regarded by the courts with the disfavor with which it

> was once regarded, still the courts will not indulge in any presumption in its favor. The bar must clearly appear on the face of the complaint or it must be clearly pleaded and proven by a preponderance of the evidence that the bar exists, before it will be recognized as a defense to an action."

In *Wickwire v. Reard*, 37 Wn. (2d) 748, at page 759, 226 Pac. (2d) 192, the Court stated as follows:

> "Underlying our appraisal of the issues before us is the long standing rule in this state that the Statute of Limitations, although not an unconsciouble defense is not such a meritorious defense that either the law or the facts should be strained in aid of it."

SUMMARY

From the foregoing Statement of the Case and Argument it is submitted that the facts and law establish that the promise by Harvester to Ford was a continuing promise that Harvester would not allow another Harvester farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating the Harvester dealership in Davenport. This obligation on the part of Harvester continued from the commencement of Ford's operation in Davenport until the termination thereof. Harvester was under the same obligation on the last day of Ford's operation in Davenport as it was on the first day of operation by Ford in Davenport. During each and every day that Ford was operating the dealership in Davenport, Harvester was under the continuing obligation "not to permit a Harvester dealership to operate in Edwall." Certainly

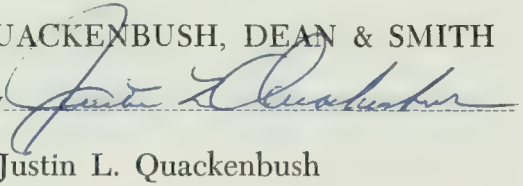
Harvester breached its agreement with Ford on the first day that it allowed St. John Hardware to operate in Edwall in competition with Ford, and likewise Harvester continued to breach its agreement with Ford on each and every day thereafter that it (Harvester) permitted St. John Hardware to operate in Edwall, Washington. As such, it is respectfully submitted that the promise and covenant by Harvester was a continuing one and that likewise Harvester continuously breached its promise to Ford so long as Harvester permitted St. John Hardware to operate in Edwall in competition with Ford. Such being the case, it is submitted that the plaintiff Ford is entitled to recover the damages as ascertained by the Court during the three years immediately preceding the commencement of the action by Ford.

CONCLUSION

The judgment in favor of International Harvester Company dismissing the Complaint of the plaintiffs, Ford, et ux, et al, should be reversed and the cause remanded to the trial court for entry of judgment in favor of Ford in the amount of damages as determined by the trial court.

Respectfully submitted,

QUACKENBUSH, DEAN & SMITH

By 

Justin L. Quackenbush

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JUSTIN L. QUACKENBUSH

Attorneys for Appellant

APPENDIX OF EXHIBITS

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No. 21964

IN THE

United States Court of Appeals
For the Ninth Circuit

LOREN FORD and FRANCES FORD, Husband and Wife, and DAVENPORT EQUIPMENT COMPANY, INC., a Washington Corporation,

Appellants,

vs.

INTERNATIONAL HARVESTER COMPANY, a Delaware Corporation,

Appellee.

No. 21964

Appeal from a Judgment of the United States District Court for the Eastern District of Washington Northern Division

REPLY BRIEF OF APPELLANTS

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ADDITIONAL STATEMENT OF THE CASE

Reference is made in the Appellee's Additional Statement of the Case to certain oral discussions which took place between Harold Berry, the District Manager for Harvester and the plaintiff Ford in 1961 concerning the operation of a Harvester dealership in Edwall, Washington by the St. John Hardware. It is pointed out to the Court that the District Manager Berry, at no time informed Ford that Harvester would not live up to its agreement with Ford. The only statement made by Berry was that Howell had threatened to sue Harvester if they (Harvester) tried to put him out of Edwall. At this point Ford informed Berry that he in turn would sue Harvester if they did not terminate the St. John Hardware operation in Edwall. Berry was not willing to make a decision or act upon either of these threats.

Thereafter, in March of 1961, State Senator Raugust, a successful Harvester dealer in Odessa, Washington, wrote a letter (Exhibit 131) to Harvester concerning the promises made to Ford. No reply was made to this letter by Harvester. (R 118). Likewise, on December 19, 1963 Ford wrote another letter to Harvester demanding termination of the operation in Edwall, Washington (Exhibit 124) but no reply was made to this letter by Harvester. (R 143). The first reply to any of Ford's letters to Harvester was Berry's letter of December 8, 1964 (Exhibit 127). At no time prior thereto had Harvester, or any agents thereof unequivocally informed Ford that it would not live up to the promise as made by District Manager Wells.

Another obvious inconsistency exists in Appellee's Brief. At page 2 of its Brief Appellee refers to a prospectus (Exhibit 6) given to Ford by Harvester in October, 1958. This prospectus was given to Ford prior to the promise made to Ford by Harvester as found by the Court. Certainly Appellee cannot rely on the unilateral exclusionary statement therein contained as there is no evidence whatsoever that this "prospectus" constituted a contract between the parties. Appellee itself recognizes the lack of legal efficacy of this prospectus at page 21 of its Brief with the following statement:

> "Even a cursory reading of the prospectus shows that it is neither a promise nor a representation of fact."

LIMITATIONS OF ACTIONS

The Appellee cites only two cases in answer to the Appellant's position that a continuing covenant arose by reason of the promise made by Harvester. This promise was found by the Court to be as follows:

> "That defendant (Harvester) would not permit any International Harvester farm equipment dealership to operate in Edwall, 23 miles away from Davenport, in competition with the plaintiffs (Ford) so long as the plaintiffs (Ford) were operating an International Harvester dealership in Davenport." (Tr. 46).

The case of *Kennedy vs. Neilicke Calculater Company*, 90 Wn. 238, 155 Pac. 1043 in no way supports the Appellee's position that the promise as made by Harvester was not a continuing covenant. Said case merely established that

where the defendant Calculator Company had sold defective calculators to the plaintiff and the plaintiff had knowledge that all of the calculators were defective, that the plaintiff could not expand his damages by continuing to attempt to sell the admittedly defective calculators. The Supreme Court of the State of Washington in fact affirmed the damage award to the plaintiff, reducing the judgment by the sum of $76.00 for an item of expense which was "obviously not made under and in faith of the contract, but was entirely voluntary." The cited case is not apposite to the instant case wherein damages accrued daily to the plaintiff Ford by reason of the continuing competition with Ford by St. John Hardware while Harvester was allowing St. John Hardware to operate a dealership in Edwall in contradiction of the agreement as previously made with Ford.

At page 12 of the Appellee's Brief we find the following statement:

> "Assuming for the sake of argument that Ford had a continuing contract, his cause of action arose when the first breach occurred. This question was squarely before the Court in *First Loan and Trust Company vs. Schanche,* 206 N. W. Reporter, 390 (South Dakota), which involved a contract of continuing support."

It is respectfully submitted that the cited case is in fact a separate and distinct case from the one involved herein, and in fact contains language which supports the Appellant's position. In the cited case the Court merely held that where an agreement for support contained a provision for stipulated liquidated damages of $500.00 upon breach that

since the damages were stipulated, the statute of limitations ran from the date of the breach. At page 391 of the cited case the Court states as follows:

> "Under the terms of the contract, the full amount of the stipulated damages became due and owing upon the breach thereof and could then have been recovered."

In the instant case it is obvious that the damages incurred by the plaintiff Ford were not liquidated, and of course a full recovery of damages by Ford could not have been had upon the first breach by Harvester. The cited case supports the position of the Appellant Ford in stating as follows:

> "In determining when the statute begins to run upon the breach of a continuing contract, the question depends largely upon the inquiry whether a complete right of action accrued at the time of the first breach."

Obviously in the instant case the damages which might be incurred by Ford could not be determined or had upon the first breach by the defendant Harvester.

A further case which establishes the doctrine of a continuing breach is *Builders Supply Corporation vs. Marshall*, 352 Pac. (2d) 982. In discussing continuous breaches the Court states at page 986 as follows:

> "A cause of action accrues – in the terms of the statute of limitations – each time defendant fails to perform as required under the contract . . . perhaps plaintiff might have considered the underpayment of No-

> vember, 1948 as a repudiation of anticipatory breach and brought suit at that time for all his prospective losses, *but his failure so to do did not deprive him of his legal right to recover each deficiency as it appeared.* (Emphasis supplied). Thus, although the six-year limitations barred the recovery of any debt arising prior to May 16, 1949 (6 years before the Complaint was filed) obligations accruing after that date still are enforceable."

It is submitted that the promise and covenant by Harvester to Ford was a continuing promise that Harvester would not allow another Harvester farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating the Harvester dealership in Davenport. It is likewise submitted that Harvester continuously breached its promise to Ford, so long as Harvester permitted St. John Hardware to operate in Edwall in competition with Ford.

The Appellee takes the position at page 7 of its Brief that "Harvester breached the alleged agreement when the dealer was permitted into Edwall." *The distinction here is important.* The promise as found by the Court *was not* that "Harvester would not permit a dealer to go into Edwall," but in fact the promise found by the Court was that "*the Harvester Company would not permit any Harvester dealership to operate in Edwall, Washington in competition with the dealership of Ford, as long as Ford was operating an International Harvester dealership in Davenport, Washington.*" (Finding of Fact VI, Tr. 46). Each day that Harvester allowed St. John Hardware to operate in Edwall con-

stituted a breach of the agreement. In this connection the attention of the Court is called to the provisions of the Dealer Sales and Service Agreement between the Harvester Company and St. John Hardware and Implement Company covering St. John's operations. (R 284, 285, 286.) (Exhibit 112). At page 19 of Appellee's Brief we find the following statement.

> "In the instant case Harvester is not responsible for the sales made by St. John Hardware at its branch store in Edwall, and any damages allegedly suffered by Ford were not the proximate result of Harvester's entering into a written dealership with St. John Hardware several months after it actually opened for business in Edwall. *St. John Hardware could have done business at Edwall without a dealership agreement indefinitely.*"

This statement of the Appellee is contrary to the facts and law of the case. At page 13 of St. John Hardware's Dealer Agreement, under "Termination for Cause, sub paragraph (3) (viii), it is provided that the company may at its option terminate the agreement effective at once in the event of the happening of any of the following:

> "(viii) If, without the written consent of the company signed by the District Manager or Assistant District Manager, the Dealer shall sell or offer for sale any of the goods purchased under the agreement at or from any retail establishment other than the establishment referred to on page 3 of the agreement, any such consent, if given, being subject to withdrawal at any time by written notice to the Dealer signed by the District Manager or Assistant District Manager." (Exhibit 112) (Tr. 284, 285, 286).

From the foregoing it is obvious that the Appellee's statement: "St. John could have done business in Edwall without a dealership indefinitely," is completely without factual foundation, as such operations were contrary to the provisions of St. John's Dealership Agreement. (R284, 285, 286). Likewise, under paragraph 24 (c) of St. John's Edwall Dealership Agreement, (Exhibit 112) Harvester could have terminated St. John's operation in Edwall *without cause* upon thirty days notice.

PAROLE EVIDENCE RULE

The defendant Harvester Company has likewise attempted to impose the parole evidence rule in an effort to avoid its liability to the plaintiff Ford. The Court's attention is called to the fact that the defendant Harvester Company is relying upon it standard form sales agreement which is delivered to all dealers. Such contracts are referred to as "Adhesion Contracts." The treatment to be accorded such contracts is succinctly set forth in *Standard Oil vs. Perkins*, 347 Fed (2d) 379 (1965) where at page 383 the Ninth Circuit Court of Appeals stated as follows:

> "It bears emphasis that we here deal with a so-called "Adhesion" contract prepared by Standard. Provisions in such contracts should be construed in accordance with the understanding attached to them by laymen unversed in the law. 'Adhesion Contract' is a handy shorthand description of standard form printed contracts prepared by one party and submitted to the other on a take it or leave it basis. The law has recognized there is often no true equality of bargaining power in

such contracts and has accommodated that reality in construing them."

Exhibit 101, the standard form Dealer Sales and Service Agreement makes no reference whatsoever to whether or not defendant Harvester would allow another Harvester dealer to operate in Edwall in competition with the plaintiff Ford's dealership in Davenport. The first paragraph of the standard form agreement states as follows:

> "The general purposes of the agreement are to establish the dealer as a *dealer of the goods* covered by the agreement and *to govern the relations between the dealer and the company in promoting the sale of those goods,* in the purchase and sale by the dealer, and in providing warranty and other services for their users."

The oral agreement as found by the Court in no way varies, alters, or contradicts the standard form agreement. The agreement in question pertains only to the sale of goods and the merger clause as contained in paragraph 29 of the standard form agreement states as follows:

> "All understandings and agreements between the parties are contained in the agreement, which supersedes and *terminates all previous agreements* between the parties *pertaining to the sale of the goods covered by this agreement.*" (Emphasis supplied).

Obviously this merger clause applies only to "previous agreements between the parties pertaining *to the sale of goods* covered by this agreement." Nothing whatever is said concerning operations in Edwall, Washington in any portion of this standard form agreement.

The law in the State of Washington clearly establishes that people have the right to make their agreements partly oral and partly in writing, and the parole evidence rule only prevents the introduction of parole testimony which is in contradiction of the written agreement. In *MacGregor vs. First Farmers Merchants Bank*, 180 Wn. 440 (1935) 40 Pac (2d) 144, the Court at page 444 stated as follows:

> "Certain exceptions to the rule are as firmly established as the rule itself. In fact, they may be said to be a part of the rule. We mention only one or two of the exceptions which we conceive to be applicable here. One is that, where a parole contemporaneous agreement is the inducing and moving cause of a written contract, or where a parole agreement forms a part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parole contract or representations, then such evidence is admissible."

In *Barber vs. Rochester*, 52 Wn. (2d) 691 (1958) 328 Pac (2d) 711, the Court at page 698 stated as follows:

> "People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the Court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing, or not. That is a question of fact."

Likewise at page 697 of Barber vs. Rochester, supra, the Court cited Wigmore on Evidence as follows:

> "Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent

of the parties thereto. In this respect the contrast is between voluntary integration and integration by law. (post § 2450). Here the parties are not obliged to embody their transaction in a single document; yet they may, if they choose. Hence it become merely a question whether they have intended to do so.

"This intent must be sought where always intent must be sought (ante § § 42, 1714, 1790), namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witness may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears evidence on both sides; his decision here, pro or con, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that if they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that if they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place."

In the case of *Becker vs. Lagerquist Brothers, Inc.*, 55 Wn. (2d) 348 Pac. (2d) 423, the Court dealt with a parole agreement and likewise a claim similar to the one made in the instant case by the defendant Harvester that the merger clause prevented evidence of an oral agreement. The Court at page 429 cited 55 Am. Jur, 573, 574, ¶ 98 as follows:

> "The parole evidence rule does not exclude evidence of an oral agreement which the parties could not reasonably be expected to embody in the written agreement."

The Court likewise stated as follows:

> "Where a contract required to be in writing is in writing, an independent collateral agreement with reference to the same subject matter, may be in parole where the statute does not require it to be in writing . . . the so called parole evidence rule is not an exclusionary device to prevent the introduction of oral testimony. The primary test for applying it was stated in *Gaffney vs. O'Leary*, 155 Wn. 171, 283 Pac. 1091 as 'the first question is whether the entire contract of the parties was embodied in the order referred to and therefore was not subject to be supplemented by oral testimony. The well settled rule is that, where it appears that only a part of a contract is in writing, the part not in writing may be proved by oral testimony insofar as it is not inconsistent with the written portion."

In University Properties, Inc. vs. Moss, 63 Wn. (2d) 619 (1964), 388 Pac. (2d) 543, the doctrine of "Partial Integration" is recognized. At page 621 the Court states as follows:

> "The general rule is that the terms of a written lease may not be added to, contradicted, or varied by its extrinsic evidence. A time honored exception to the rigidity of this rule is the doctrine of 'partial integration.' 9 Wigmore on Evidence § 2430. The writing may be a final expression of the agreement between the parties only as to such terms as are included therein. Evidence of additional terms is admissible unless the Court finds that the writing was intended as a complete, exclusive statement."

It is respectfully submitted that the oral agreement as found by the Court in no way adds to, contradicts or varies the standard form contract of Harvester, and that likewise the Trial Court found that the standard form agreement did not contain all of the agreements of Ford and Harvester.

DEALERSHIP & EXCLUSIVE AGENCY CASES

The defendant Harvester has cited several cases contending that the promise as made by Harvester to the plaintiff Ford was "illusory." A reading of these cases clearly establishes that they are not applicable to the instant case. The case of *Curtis Candy Company vs. Silverman*, 45 Fed. (2d) 451 did not turn upon an agreement such as the one in the instant case, but rather was disposed of on a finding of a termination of the agreement prior to any damages being incurred. In fact the Court did allow such damages as accrued prior to a termination of the agreement in question.

The case of *International Shoe Company vs. Carmichael*, 114 So. (2d) 436 contained only a finding that the damages suffered by the dealer did not result from any breach of the alleged agreement. Such is not the case in the instant

case, as the Court has specifically found that the plaintiff Ford was damaged in the amount of $39,300.00 by reason of the defendant Harvester's breach of its agreement. (Tr. 49-50).

The Appellee Harvester has mistakenly emphasized its statement as follows:

> "St John could have done business at Edwall without a dealership agreement indefinitely." (Appellee's Brief, page 19).

As has been previously pointed out, the dealership agreement between St. John Hardware and Harvester prevented St. John Hardware from doing business in any location other than St. John, Washington without the written approval of Harvester and the setting up of a business by St. John Hardware in Edwall was in contradiction of the written terms of the dealership agreement between Harvester and St. John Hardware. (R284, 285, 286). Harvester was legally in a position where it could have at any time required St. John Hardware to terminate its operation in Edwall, Washington. Even after the execution of a contract by Harvester with St. John Hardware for a dealership in Edwall, Harvester could have, under the terms of its written contract with St. John Hardware, terminated the operation in Edwall upon thirty day notice. (Exhibit 112 ¶ 24) (c).

The case of *Ford Motor Company vs. Kirkmyer*, 65 Fed. (2d) 1001 has no application to the instant case, inasmuch as that action was merely an action by a dealer for damages

based upon the termination of an agreement which the Court found to be terminable at will. Such was not the case in the instant action. This action is one for damages arising during the existence of a specific covenant as found by the Court.

DAMAGES

The Appellee contends that there is no evidence upon which to base lost wages of $800.00 per month suffered by Mr. Ford as a result of the breach of the agreement by Harvester. It is submitted that such a finding is within the testimony. In response to a question as to whether or not the sum of $600.00 a month was a reasonable sum for a salary for Mr. Ford in his business in Davenport, Washington, Senator Raugust stated as follows:

> "Why, that is lower than I pay my bookkeeper." (R 119).

The loss of Mr. Ford's capital investment was found to be the sum of $3,300.00. (Tr. 50) (R 145). Likewise Senator Raugust testified that had there not been a Harvester dealer in Edwall the Davenport dealership would have done a gross sales of $250,000.00 per year and that the profits from such sales should have run from 3% to 5%. (R 121). As such, the findings of the Court of lost profits of $7,200.00 per year is entirely within the testimony.

CONCLUSION

The Trial Court found that Harvester made a separate

independent promise to Ford, to-wit: That Harvester would not permit any Harvester dealership to operate in Edwall, Washington in competition with the dealership of Ford so long as Ford was operating a Harvester dealership in Davenport, Washington. This obligation on the part of Harvester continued from the commencement of Ford's dealership in Davenport, until its termination. It is respectfully submitted that this promise and covenant by Harvester was a continuing one. The Statute of Limitations would only bar recovery for damages arising from breaches of this covenant more than three years prior to the commencement of this action. The Judgment in favor of International Harvester Company dismissing the Complaint of the plaintiffs Ford et ux, et al should be reversed and the cause remanded to the Trial Court for entry of Judgment in favor of Ford in the amount of damages as determined by the Trial Court.

Respectfully Submitted,

QUACKENBUSH, DEAN AND SMITH

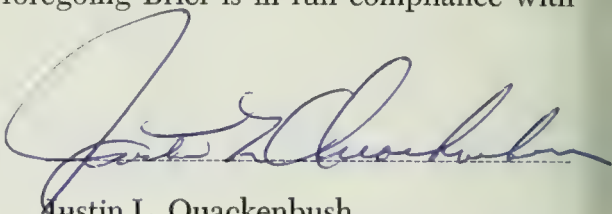
By 

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Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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No. 21966

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEHZAD KASRAVI,

Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Appellee.

APPELLANT'S OPENING BRIEF.

BEHZAD KASRAVI,
2306 Nella Vista Avenue,
Los Angeles, Calif. 90027,
Appellant, In Propria Persona.

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BEHZAD KASRAVI,

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APPELLANT'S OPENING BRIEF.

I, Behzad Kasravi, the petitioner, am not an attorney at law. As my record shows, in the past I have been assisted by good lawyers in the pending case. The expense of providing a legal brief prepared professionally is prohibitive for me at this time. May I ask for the court's tolerance.

I am asking the Immigration and Naturalization Service to allow me to stay in the United States and not to deport me to Iran, my homeland. I have documented my reasons for this request in detail as the record shows. I have produced witnesses of authority who supported my contention that Iran today is governed by the hand of a despot, that the government of Iran at this time is dictatorial, and has persecuted, imprisoned, tortured and murdered many of Iranian citizens who is some way resisted the Shah's regime.

I feel that a brief history of the background and present situation in Iran will be helpful to the Court. During World War II, the father of the present Shah was the dictator of Iran. He would not cooperate with the Allies in letting the transportation of American arms to Russia through Iran. He created the fiasco of Iranian military fighting the mighty Allied forces for a few days. No need to say who won. He abdicated his throne to his son, at the time a young man without any record. Due to weaknesses in the dictatorship, a revival of political movements appeared in Iran and people took more part in their own government and the Parliament. It was during this time, that my father, who was a "reformer" and an active critic of the Shah's government was assassinated (in 1946). People wanted to nationalize their oil industries which up to that point (early 1950's) had been in the hand of the British monopolies. Finally Dr. Mossadegh, the premier and the head of the government, achieved this goal of the people.

Here I am getting into some area which I hope this court will be tolerant with me. I am going to criticize the American Government which through the CIA and with the expenditure of twenty to forty million dollars from the American tax-payers' pockets helped overthrow the legal and popular government of Dr. Mossadegh and reinstated the Shah who at that time (1953) had escaped to Europe. The influence of the American oil companies and their lobbying in Washington had much to do with the situation. American oil interests were replacing the British. Since then the CIA's activities have come to the open in many instances and a good number of books have exposed it.

American government since World War II has made serious mistakes in its foreign policy and only recently many American citizens are taking a serious look at it. I hope my criticism of American foreign policy does not offend the court. All governments and nations in the past have made serious mistakes in their policies, internal and external, and the hope is that constructive criticism will help towards a solution.

In the United States the courts are not the mouthpiece of the government, but I believe they eventually assert their influence for the better.

Since 1953, when the Shah returned to Iran with the help of the CIA, the internal situation of Iran has deteriorated. Freedom of expression has been suppressed, and many students and other Iranians have given their lives as a price to oppose the despotic rule of the Shah. American foreign aid to Iran has been many, many millions since 1953. Iran has natural resources including vast amounts of oil. On the other hand Iran is one of the few underdeveloped countries which is *not* overpopulated. Yet Iran receives American foreign aid. Much of the aid has been military goods. Whatever the pretense for the arms aid may be, so far it has been used against the Iranians only.

My brief account of the recent Iranian situation and CIA influence is supported by many American publications. Here I submit the particulars of three books: 1. Nationalism in Iran, by Richard W. Cottam; 2. CIA, The Inside Story, by Andrew Tully; 3. The Invisible Government, by David Wise and Thomas B. Ross.

It seems the only qualification for being an ally of United States, according to the current foreign policy.

is to be anti-communism. The Shah of Iran claims to be that. And no matter what he has done he is still an ally. The problem with this policy is that the Shah has really done nothing for the Iranian people. Meanwhile the United States is losing a friend, and the Iranians suffer.

Ultimately it is the individual who suffers the consequences of these national follies. And suffering knows no national boundary or nationality. I do not want to be the victim of all that is now going on in Iran.

My application for suspension of deportation should have been granted. The record clearly shows that I would suffer extreme hardship if I were deported to Iran. The decision against me in connection with this application was a finding ignoring all the evidence and deprived me of due process of law.

The denial of my application for a stay of deportation to Iran because of persecution for political opinion under Section 243(h) of the Immigration and Nationality Act, as amended, clearly ignored the record in this case and the evidence presented, and was an abuse of administrative discretion and deprived me of due process of law.

It have raised these points in my Petition for Review. The record is clear and supports my position without any doubt. It would serve no purpose to repeat all the points made during the several hearings and arguments made in applications and briefs filed with the Immigration and Naturalization Service and Board of Immigration Appeals. That record is now before this Court.

I respectfully submit that the Court should come to different conclusions than that of the Board of Immigration Appeals.

Respectfully submitted,

Behzad Kasravi,

Appellant, In Propria Persona.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Behzad Kasravi

No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. Douglas Wikle, Trustee in Bankruptcy, for Nevada Henderson Land Co., a corporation,

Appellant,

vs.

Country Life Insurance Company, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANT'S OPENING BRIEF.

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2 Collier on Bankruptcy, Par. 23.07(2), p. 524 10
2 Collier on Bankruptcy, Par. 23.08(5), p. 547 .. 30
3 Collier on Bankruptcy, Par. 57.20, p. 314 18
8 Collier on Bankruptcy, Par. 3.02, p. 176 23
8 Collier on Bankruptcy, Par. 3.22, p. 264 15
8 Collier on Bankruptcy, Par. 3.22(2), p. 272 19
8 Collier on Bankruptcy, Par. 301, p. 170 35
9 Collier on Bankruptcy, Par. 10.10, p. 510 26
5A Remington on Bankruptcy, Sec. 2357, p. 80 14
5A Remington on Bankruptcy, Sec. 2361, p. 94 25
5A Remington on Bankruptcy, Sec. 2374, p. 118 25
5A Remington on Bankruptcy, Sec. 2374, pp. 119, 120 14
5A Remington on Bankruptcy, Sec. 2384, p. 135 35

No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. Douglas Wikle, Trustee in Bankruptcy, for Nevada Henderson Land Co., a corporation,

Appellant,

vs.

Country Life Insurance Company, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANT'S OPENING BRIEF.

I.

Jurisdictional Statement.

This is an appeal from an Order entered on March 8, 1967, by the United States District Court, Central District of California (page 484 of the Transcript of Record on Appeal), hereinafter designated as "R", which Order affirmed the Referee's Order of October 28, 1966 [R. p. 409], dismissing the Trustee's Application to Quiet Title, "without prejudice".

The Trustee's present appeal from the aforesaid District Court Order has been duly perfected under the provisions of Sec. 24, Subsections (a) and (b), of the National Bankruptcy Act (11 U.S.C., Sec. 47(a)(b)), which constitutes the jurisdictional basis therefor.

Statement of the Case.

The Referee's aforesaid Order of October 28, 1966, was the result of proceedings commenced by appellant's "Application for Order to Show Cause to: (1) Quiet Title to Real Property; (2) For Declaratory Relief with Respect Thereto; and (3) Cancellation of Documents Constituting a Cloud on Title of Such Real Property", dated June 29, 1966 [R. p. 235], and the "Order to Show Cause Re Real Property" issued thereon, dated June 30, 1966 [R. p. 252].

None of the respondents, now appellees on appeal, filed an answer to appellant's above-described application of June 29, 1966; instead, they merely filed written objections to the jurisdiction of the bankruptcy court. At this point, it should be noted that one of the remarkable features of this unique case (and the latter term is used advisedly, and despite an awareness of the general propensity of attorneys to view their own case as "unique" or "remarkable") is the fact that not one scintilla of oral testimony, nor one scrap of documentary evidence has been formally introduced despite the following facts: (1) the case has been pending for almost two years; (2) the file, conservatively, is several inches thick with pleadings, documents, appraisal reports, briefs, etc., and (3) there is involved, conservatively, an equity in real property in excess of One Million Dollars ($1,000,000.00).

Furthermore, the failure of the courts below to admit evidence in a case of such obvious importance is all the

more puzzling in light of the overwhelming authority for the proposition that in all instances in which its jurisdiction is challenged the bankruptcy court has:

> ". . . in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court." (*Taubel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U.S. 426, 44 S. Ct. 396, 68 L. Ed. 770. See, also, *Wuchner v. Goggin* (9th Cir., 1949), 175 F. 2d 261).

See, further, 2 Collier on Bankruptcy, Para. 23.07, page 519, *et seq.*, in which the following appears at pages 521, 522:

> "A necessary corollary to these principles is that in all proceedings to recover summarily the possession of property from the hands of third persons, 'there is preliminary jurisdiction to inquire into the nature of the defendants' possession and any adverse claim so far as to see whether it is more than colorable' (quoting from *Chandler v. Perry*, (5th Cir.) 74 F. 2d 371, which, in turn, cited *Mueller v. Nugent*, 184 U.S. 1, 22 S. Ct. 269, 46 L. Ed. 405). In other words, it becomes necessary for the court to determine as to the substantiality of the adverse claim, if any, prior to assuming summary possession of the property *and for this reason the court may make its inquiry into the basis of the claim. The mere assertion of an adverse claim is not enough to prevent the exer-*

cise of summary jurisdiction by the bankruptcy court; but in all cases the claimant is entitled to be heard." (Emphasis added).

In the anomalous posture of the case, arising from the fact that no formal evidence has ever been introduced, it is submitted that the allegations of appellant's Application must be taken as admitted under Local Rule 222 and Rule 8(d) Federal Rules of Civil Procedure. Thus, in *Moore v. Linahan* (2nd Cir., 1941), 117 F. 2d 140, *cert. den.,* 314 U.S. 628, 62 S. Ct. 59, 86 L. Ed. 504, the court held that facts alleged in an involuntary petition for corporate reorganization were admitted by failure to deny them. Similarly, in *Zydney v. New York Credit Mens' Ass'n.* (2nd Cir., 1940), 113 F. 2d 986, it was held that where an "answering affidavit" of a trustee in bankruptcy to a petition in reclamation was merely argument based upon testimony of the petitioner and officers of the bankrupt when examined by the trustee, such affidavit was *not* an "answer", and the petition, accordingly, stood as admitted (See, also, *Sun Maid Raisin Growers' Ass'n. v. Neustadter Bros.* (9th Cir., 1941), 115 F. 2d 126).

Another very material result of (1) appellees' failure to file answers, and (2) the fact that no formal evidence, as such, has been introduced, is the effect of this upon the scope of review. Thus, the law is clear that where, as here, the facts are not in dispute, a Referee's deductions or inferences, as well as his conclusions of law, therefrom, are *not* within the so-called "clearly erroneous" doctrine, and, accordingly, are *not* binding on the reviewing or appellate court (*Tepper v. Chichester* (9th Cir., 1960), 285 F. 2d 309, 312; *In re De Jay Stores, Inc.* (D.C., N.Y. 1963), 220 F. Supp. 497,

500; *In re Stewart* (D.C., Ore., 1964), 233 F. Supp. 89, 91; *In re Itemlab, Inc.* (D.C., N.Y., 1966), 257 F. Supp. 764). The theory, of course, is that in such circumstances, the reviewing or appellate court is at least as competent as the Referee to draw inferences and conclusions of law from admitted or undisputed facts.

Accordingly, appellant's aforementioned application, dated June 29, 1966, is incorporated herein by reference as though set forth herein in full. However, the following "summary" of the facts as alleged therein, as well as certain additional facts admitted by some of appellees' pleadings and briefs, is set forth for the court's convenience, as follows: the instant case was commenced on January 4, 1966, by the filing of a Petition for an Arrangement under the provisions of Chapter XI of the Bankruptcy Act. This petition was filed on the debtor's behalf by its attorney, Mr. Burke Mathes. (We will consider at some length hereinbelow, appellee's belated, and, we submit totally unfounded, assertions that the proceeding somehow became a "straight bankruptcy" proceeding on January 13, 1966).

On January 4, 1966, the then debtor corporation was the undisputed owner of record of a convalescent hospital commonly known as 2940 W. Whipple Avenue, Redwood City, California (in San Mateo County), which hospital was designated as "Sunshine Convalescent Hospital". Also, on said date, the property was subject to the following encumbrances of record: (1) a first trust deed held by Country Life Insurance Company, an Illinois corporation, hereinafter referred to as "Country Life", securing an indebtedness in the original principal sum of $900,000.00; (2) a second trust deed now in favor of Ropat Investment Company, hereinafter

referred to as "Ropat", Universal Surgical Supply, Inc., hereinafter referred to as "Universal", and Casavic, S.A., a Mexican corporation, hereinafter referred to as "Casavic", and (3) a third trust deed in favor of J. G. Richardson and George B. McClyman, hereinafter referred to as "Richardson" and "McClyman", respectively. Although the original principal indebtednesses secured by the second and third trust deeds were $200,000.00, and $172,000.00, respectively, the beneficiaries under said trust deeds have agreed in writing, as alleged in Paragraph XIII of the appellant's Application, to execute reconveyances in consideration of payment of an aggregate of $100,000.00, for *all* interests in both said second and third trust deeds.

As alleged in Paragraph XII of appellant's Application, the fair market value of the convalescent hospital is "not less than $2,185,000.00". In this connection, Referee Bergener, on his own motion, appointed one Joseph Donovan to appraise the property. Mr. Donovan's appraisal on file herein, dated May 26, 1966, is in the sum of $1,900,000.00.

Since the property was purportedly sold under the power of sale, after bankruptcy, and under highly questionable circumstances, to Country Life, for $871,191.97, a sum slightly less than the balance then owing Country Life, it is obvious that *a most substantial equity* has "gone down the drain" unless, as we strongly urge, this court has the power, jurisdiction and duty to set aside the wholly improper and invalid orders pursuant to which Country Life purported to cause the property to be sold.

On January 6, 1966, Referee Bergener appointed appellant, presently trustee, as the Chapter XI receiver.

Appellant was later appointed trustee on or about March 29, 1966, shortly after the entry of an order adjudicating the debtor corporation a bankrupt.

Prior to the debtor's filing of its Petition for an Arrangement on January 4, 1966, Country Life had commenced the procedural steps preliminary to a sale of the property in issue under the power of sale contained in its trust deed, and *subsequently* Country Life filed an action in the Superior Court of San Mateo County, solely for "Specific Performance" of rental collection provisions contained in its trust deed, in which it prayed for the appointment of a state court receiver to collect the rents owing on the debtor's convalescent hospital. However, as admitted in one of Country Life's own pleadings filed herein, to wit: its memorandum in support of its motion to dismiss the debtor's Chapter X petition, filed on January 17, 1966 [R. p. 74], *in truth and in fact, the hospital was closed and not in operation, hence there were no rents to be collected.* Thus, commencing at page 1, line 30, to page 2, line 3, of Country Life's last-mentioned document, the following is stated:

> "The debtor's sole asset is real estate in San Mateo, California (sic) upon which a hospital has been constructed. *The hospital has since been closed and not in operation since November, 1965".* (Emphasis added).

On November 15, 1965, the Superior Court entered an order appointing a receiver to collect non-existing rents from non-existing tenants! As alleged in appellant's Application, the state court receiver never took possession of the debtor's real property and, quite obviously, never collected any rents.

As will be pointed out hereinbelow, it was the pendency of this specific performance action, which Country Life misrepresented to Referee Bergener to be a "foreclosure proceeding", and the wholly spurious "receivership", which counsel for Country Life urged as depriving the bankruptcy court of jurisdiction, and all this despite the fact that Country Life, in fact, at all times intended to cause the property to be sold extrajudicially, which fact it conveniently neglected to inform Referee Bergener at the hearing of January 13, 1966.

Concomitantly with the filing of the Chapter XI petition on January 4, 1966, Mr. Mathes, as counsel for the then debtor, procured an order restraining Country Life from causing the debtor's real property to be sold on January 5, 1966, under the power of sale, pending a hearing set before Referee Bergener on January 13, 1966. Likewise on the date he filed the Chapter XI proceeding, Mr. Mathes procured a further, and very common, order granting the debtor ten (10) days within which to file its schedules, etc. On the same date as the hearing on the aforementioned restraining order, viz.: January 13, 1966, the debtor's schedules were filed; however, by obvious inadvertence or oversight, counsel for the debtor overlooked substituting for the printed form "Petition", applicable to normal bankruptcy proceedings, a special page referring instead to Chapter XI. That this was unintentional and purely inadvertent is clearly evident from the fact that counsel for the debtor filed subsequent documents making reference to the pendency of a Chapter XI proceeding (*e.g.*, the Order of Reference under Chapter X filed January 19, 1966 [R. p. 87], *inter alia*, bears the double caption: "In Proceedings for an Arrangement" and "In Pro-

ceedings for the Reorganization of a Corporation"), However, since Referee Bergener did not see fit to permit evidence to be introduced, appellant appended an affidavit of Mr. Mathes, dated January 25, 1967, to his Brief on Review, and incorporated the same therein by reference. The said affidavit, marked "Exhibit A", appears in the Record at page 133.

On January 11, 1966, Country Life filed its written objection to jurisdiction of the bankruptcy court, and alleging as ground therefor that the debtor's real property was in the exclusive custody of the Superior Court of San Mateo County. In its written objection to jurisdiction [R. p. 34], Country Life made the following misrepresentations at page 1, lines 25 to 29, inclusive:

> "On November 5, 1965, said Superior Court appointed a Receiver to take possession of the said property *and the rents therefrom* in aid of your Respondent's *foreclosure proceeding*. Said Superior Court, through its Receiver has had custody of said property at all times thereafter." (Emphasis added).

Since, as previously noted, the Superior Court lawsuit was *not* a "foreclosure proceeding", and since there were no tenants and, therefore, no rents to be collected, and, in fact, the State Court Receiver never took possession of the property, and never collected any "rents," the above-quoted language is, at least, highly misleading, if not actually false, irrespective of Referee Bergener's reluctance to recognize that Country Life's above representation was something less than accurate. Of course, the legal significance of the misrepresentations made is the fact that under the doctrine of *Emil v. Hanley*

(1954), 318 U.S. 515, 63 S. Ct. 687, 87 L. Ed. 954, if a State Court Receiver *actually* had possession and custody of the debtor's realty pursuant to a *legitimate* foreclosure proceeding, the bankruptcy court could not supplant such Receiver with its own, save in a proceeding under Chapters X or XII. (However even had there been a State Court Receiver in possession pursuant to a legitimate foreclosure proceeding, the bankruptcy court has jurisidiction to restrain the foreclosure proceeding by virtue of Sec. 314 of the Bankruptcy Act).

Although it may be anticipating argument, we feel constrained at this point to submit, in passing, that it is appellant's very definite position that even in ordinary bankruptcy proceedings, a bankruptcy court cannot be deprived of jurisdiction over a bankrupt's real property by the utterly spurious "receivership" present herein, involving the absurdity of a receiver appointed to collect non-existing rents. The bankruptcy court has not merely the power, but the *duty* to pierce such a thiny disguised veil of alleged "adverse possession", which is scarcely even "colorable" (2 Collier on Bankruptcy, Para. 23.07 (2), pp. 524, *et seq.*).

With respect to the hearing before Referee Bergener on January 13, 1966, appellant, who was then receiver, was *not* made a party thereto, had *no notice* thereof, *nor opportunity to be heard,* and is, accordingly, *not* bound thereby, under the most elementary principles of due process of law. We will consider this matter in more detail hereinbelow.

In any case, at said hearing, Mr. Mathes announced that he was filing a Petition for Reorganization of the debtor under Chapter X, which, he stated, rendered the

hearing "moot", following which Referee Bergener on the same day, *i.e.*, January 13, 1966, entered an Order [R. pp. 62, 63], as follows:

> "ORDERED, that that certain Order issued by this Court under date of January 4, 1966, restraining the San Mateo Title Co. and Country Life Insurance Co., an Illinois corporation, from taking steps to sell or otherwise to enforce the deed of trust referred to in said Order is hereby declared to be dissolved and of no further force and effect."

There was no evidence whatever submitted at the January 13, 1966, hearing, much less evidence establishing lack of equity in the realty, and, as will be demonstrated hereinbelow, there is a vast substantive difference between (1) an order merely dissolving a previous, temporary restraining order, and (2) an order granting affirmative leave to foreclose, the fundamental difference being that the latter type order *requires proof by a preponderance of competent evidence, that no equity exists in the property for the bankrupt or debtor's estate, or the creditors thereof.* It is obviously not the function of a court of bankruptcy to improvidently "give away", or permit to be taken, a substantial equity in a bankrupt or debtor's real property, at least, not without affording every reasonable opportunity, and a reasonable period of time, to attempt to realize such equity as may exist, either by sale or refinancing.

On January 14, 1966, the day after entry of the order of Referee Bergener, set forth hereinabove, Country Life caused First American Title Insurance and Trust Company, hereinafter designated as "First American", as trustee under Country Life's trust deed, to offer

the property for sale, presumably under the power of sale provision of said trust deed. As alleged in Para. XIX of appellant's Application, at said purported sale, First American announced, prior to offering the property for sale, that the owner of the property was in bankruptcy, and that there was some doubt as to whether the sale was proper, and that the property was, therefore, being sold *subject* to the rights of any Bankruptcy Court or Trustee in Bankruptcy. These announcements dissuaded all prospective bidders save Country Life, which proceeded to "buy" the property for $871,191.97, a figure somewhat below the balance then owing on its first trust deed. First American's deed to Country Life, a copy of which is appended to appellant's Application of June 29, 1966, as "Exhibit A", states on its face the following significant qualification:

> ". . . said sale being made *subject* to the rights of any Bankruptcy Court or Trustee in Bankruptcy." (Emphasis added).

It is submitted that the deed to Country Life did not purport to, and did *not,* transfer or convey the bankrupt estate's interest in the property in issue, and that, at most, said deed merely eliminated all inferior liens and encumbrances existing as of January 14, 1966.

Following the hearing of January 13, 1966, a Chapter X Petition was filed by the debtor and a new restraining order was procured restraining First American from delivering its deed to Country Life. Following dismissal of the Chapter X Petition, and on March 3, 1966 [R. pp. 150-153, incl.], there came on for hearing before Referee Ray H. Kinnison, acting in the temporary absence of Referee Bergener, the matter of

the order temporarily restraining delivery of the deed to Country Life. Again, the trustee in bankruptcy had no notice or opportunity to be heard, and was not a party to the proceeding, and, accordingly, is *not* bound thereby. Also, again, *not* one scintilla of evidence was introduced, much less evidence that there was no equity for the bankrupt estate in the property in issue. As a culmination of the "hearing" which consisted principally of a colloquy between counsel for the then debtor, and counsel for Country Life, Referee Kinnison entered a lengthy Order prepared by counsel for Country Life, which, in substance, amounts to an order granting leave to foreclose *ex post facto,* and, likewise, purporting to validate the Order of Referee Bergener, similarly after the fact. This "Order" is supported by neither findings of fact nor any evidence whatsoever.

It is appellant's position herein (1) that the Order of March 3, 1966, is utterly void and totally improper, and (2) that since it purports to grant Country Life affirmative relief, however improperly, Country Life, by seeking and obtaining same, thereby subjected itself to the court's jurisdiction, absent all other grounds therefor, and cannot now be heard to object to this court's jurisdiction.

As alleged in Para. XXII, and Para. XXIII of appellant's Application of June 29, 1966, following entry of the Order of March 3, 1966, Country Life purported to sell the property in dispute to appellee Sequoia Hospital District, hereinafter referred to as "Sequoia", with an option in favor of Sequoia to purchase the property, said lease-option agreement being dated March 31, 1966, and recorded on April 1, 1966, in the Official

Records of San Mateo County. Sequoia owns a large hospital facility immediately adjacent to the bankrupt's convalescent hospital.

As alleged in Para. XXIII of appellant's Application, Sequoia is *not* a bona-fide purchaser of the real property for value within the meaning of Sec. 21(g) of the Bankruptcy Act (11 U.S.C. Sec. 44(g)) because (1) Sequoia did not pay a "present fair equivalent value" and, at best, would only have a lien on the property to the extent of the consideration actually given before it acquired notice of the bankruptcy proceeding, and (2) Sequoia, in fact, had knowledge of the bankruptcy proceeding prior to March 31, 1966.

Incomprehensibly, Title Insurance and Trust Company apparently issued a policy of title insurance to Sequoia.

Extra-Judicial Sales of Real Property After Bankruptcy Without Permission of the Bankruptcy Court, Though Not Void, Are Voidable Where (1) There Is Any Equity in the Property, and/or (2) Where Any Fraud or Other Inequity Is Present.

Thus, in 5A Remington on Bankruptcy, Sec. 2357, page 80, the rule is stated as follows:

> "Foreclosure proceedings may not be instituted while the property is in the custody of the bankruptcy court without leave of such court, even though the property lies in another district."

In the same volume of Remington on Bankruptcy, Sec. 2374, the following appears at pages 119, 120:

> "Unless the court consents, subsequent attempted foreclosures are void or subject to avoidance *even though not stayed or enjoined.*" (Emphasis added).

As authority for the foregoing statement, the editors cite, in Footnote No. 8, page 120, *Re Hasie* (D.C., Tex., 1913), 206 Fed. 789, in which a post-bankruptcy sale by the trustee under a deed of trust was held *void.*

A similar view is expressed in 8 Collier on Bankruptcy, Para. 3.22, p. 264, Footnote No. 10, under the heading: "Effect of failure to stay":

> ". . . and it cannot be argued that where no stay has been entered a lien may be enforced upon property in the debtor's possession without leave of the court. *Lockhart v. Garden City Bank & Trust Co.*, (C.C.A. 2d., 1940) 4 Am. B.R. (N.S.) 594, 116 F. 2d 658. Contra: *Matter of Potts*, (E.D. Ky., 1942) 51 Am. B.R. (N.S.) 368, 47 F. Supp. 990."

The cases urged by Country Life, as assertedly supporting a contrary rule, are, in fact, *not contra* to the general rule as quoted hereinabove from both Collier and Remington, but represent a variant or "exception" to the rule based solely upon the peculiar, and similar facts involved in those cases, facts which, literally, are diametrically different from the facts involved herein.

Thus, in *Hardt v. Kirkpatrick* (9th Cir., 1937), 91 F. 2d 875, the basis of the decision appears on pages 879, 880:

> "In his answer to the Appellee's petition for an injunction, the Appellant averred under oath that the amount bid and paid for the real property and water stock, $5,250.00, 'was and ever since has been far in excess of the value of said real property and water stock, and said sale was in all respects fair and regular'. In his brief, the Appellee con-

cedes that 'in this case the market value was paid for the property', but argues that 'paying a reasonable price cannot validate illegal taking of property from the jurisdiction of the court'.

"In the language of *Hiscock v. Varick Bank,* supra (206 U.S. 28), in the instant case there is no 'fraud or a proceeding contrary to the contract' as a result of which 'the interposition of the court might properly be invoked'. *Therefore, 'in the absence of factors requiring interference, a court of bankruptcy will not disturb the foreclosure of a lien by non-judicial action when such foreclosure is in accord with the agreement of the lienor and lienee'.*" (Emphasis added).

In *Heffron v. Western Loan & Building Co.* (9th Cir., 1936), 84 F. 2d 301, the court said at page 304:

"It is, of course, an incident of the bankruptcy court's jurisdiction that such private sales are (sic, 'as'?) those in the *Hiscock* and *Robinson* cases, and in the case before us *may in such circumstances be enjoined before made or set aside after completion in the discretion of the bankruptcy court.* The sale may have been fraudulent or possess the characteristics of a preference. Again, the court may force the creditor-lienee to pursue his lien in the bankruptcy proceedings rather than *aliunde,* inasmuch as a greater equity in the property may be preserved in this manner for the general estate. *But these are matters for the discretion of the court.* (Citations omitted). *The trustee in this case has urged no particular factors militating against the particular trustee's sale sought to be*

voided, but bases his argument entirely upon the contention that, once a petition in bankruptcy has been filed, a sale dehors the bankruptcy proceeding is utterly void." (Emphasis added).

Obviously, all that the court held in the *Hardt* and *Heffron* cases, *supra,* was that where, unlike the instant case, *there is clearly no substantial equity for the bankrupt estate in and to the real property in question, and no fraud, inequity or other conduct requiring judicial interference,* courts are not going to exercise the idle and pointless act of setting aside a post-bankruptcy sale, even though technically voidable, where no substantial benefit could accrue therefrom to the bankrupt estate or its creditors. To have done so, in such circumstances, would have been an "exercise in futility". Furthermore, the court expressly pointed out that there was no fraud or misrepresentation involved, as in the instant case, and the overwhelming implication is that the court would not have hesitated to avoid the sales had there been either (1) a substantial equity in the property for creditors, or (2) fraud or inequity present, or (3) both, as is true in the instant matter.

Again, it is clear that the decisions in the *Hardt* and *Heffron* cases, *supra,* clearly represent "exceptions" to the general rule, and must be held to their peculiar facts, *i.e.,* situations in which there is no equity, fraud or other reason warranting avoidance of otherwise regular post-bankruptcy sales.

A decision involving facts more analogous to those of this case, though *not* involving fraud, is *In re Holstein Harvey, Inc.* (D.C., Del., 1928), 28 F. 2d 798, in which a state court foreclosure action was commenced

on the same day on which the bankruptcy petition was filed. The court held that since there was a substantial equity involved, the foreclosure proceedings should be enjoined. In this connection the court held, as follows, at page 799:

> "It appears from the oral evidence submitted in open court by the petitioner that the bankrupt estate has a very substantial equity in the property. . . . In view of these facts it appears that the court of bankruptcy has without doubt jurisdiction to enjoin the sale under foreclosure proceedings instituted in the state court on the very day that the petition in bankruptcy was filed. *First Trust Co. v. Baylor,* 1 F. 2d 24 (C.C.A. 8); *Britton v. Western Iowa Co.,* 9 F. 2d 488, 45 A.L.R. 711 (C.C.A. 8); *First Sav. Bank & Trust Co. v. Butler,* 282 F. 866 (C.C.A. 8)."

To summarize the foregoing, while an extra-judicial postbankruptcy sale, conducted without the permission of the bankruptcy court, is *voidable,* and *will* be set aside on any showing of a substantial equity in the property, fraud, inequity, etc., nevertheless, absent any such factors, a court will not void a sale where no real benefit would result therefrom to the bankrupt estate, merely to satisfy the whim of the trustee in bankruptcy, or to enable him to thereby attempt to extort a "settlement" offer from the hapless secured creditor (See, further, 3 Collier on Bankruptcy, para. 57.20, at p. 314).

A further cogent distinction between this case and the *Hardt* and *Heffron* cases, *supra,* lies in the fact that those proceedings were ordinary bankruptcy proceed-

ings, whereas, at the time the order of January 13, 1966 was procured herein, this was a proceeding under Chapter XI of the Bankruptcy Act. As will be demonstrated hereinbelow, by virtue of Section 311, the basis of summary jurisdiction in a Chapter XI proceeding is *either* title or possession. Thus, where, as here, a debtor incontestably had title to the real property in issue at the date of the petition, the court *ipso facto* acquired summary jurisdiction of *all* its property "wherever located", and it would seem to follow therefrom that any attempted foreclosure or other sale thereof, without the court's permission, would be *void,* not merely voidable, as in an ordinary bankruptcy proceeding where the court's permission is not obtained.

See, also, 8 Collier on Bankruptcy, Para. 3.22(2), p. 272, in which the editors, after a thorough discussion of the issue, conclude as follows:

> "And a reasonable synthesis of these cases, in light of the principles involved, would be that the secured creditor, as to collateral in the custody of either the court or the debtor in an arrangement proceeding, *must first procure the permission of the court to foreclose thereon.*" (Emphasis added).

The Order of January 13, 1966, Did Not Grant Leave to Foreclose; Furthermore, Said Order Was Procured, at Least in Part, by Misrepresentations.

As previously noted, Referee Bergener's Order of January 13, 1966, merely dissolved the temporary restraining order procured by the debtor on January 4, 1966, and nothing contained in said Order could even remotely be construed to constitute an affirmative order granting Country Life leave to foreclose, or to sell the debtor's property under the power of sale.

Since Country Life caused ("forced" might be a more accurate word) the trustee under its deed of trust to sell the property in issue, the very day after entry of Referee Bergener's Order of January 13, 1966, despite serious, and we submit, legitimate misgivings on the part of said trustee, no rational inference can be logically drawn therefrom, *save and except that at all times, Country Life intended to cause the property to be so sold* as soon as it could procure any order from the bankruptcy court which might appear, even colorably, to legitimize such sale.

There is, we submit, a vast and very real substantive distinction between (1) an order refusing to continue an injunction (based upon the assumption that the property) was in the jurisdiction of the state court), and (2) an order granting a secured creditor leave to foreclose on its security, whether by judicial foreclosure or by trustee's sale under the power of sale, on the basis of an apparent lack of equity. What Country Life, in fact, did was to procure the first type of order (based on misrepresentations), when it intended to conduct a non-judicial sale under the power of sale contained in its trust deed, a type of order (No. 2, *supra*) which could *only* be procured legitimately upon proof satisfactory to the bankruptcy court, that no equity existed in the property for the bankrupt's general creditors.

To summarize the foregoing, what Country Life did was to procure an Order vacating an injunction, based in part upon misrepresentations that the property was in the exclusive jurisdiction of a state court in connection with foreclosure proceedings, when, in truth and in fact, Country Life *intended* to have the property sold

extra-judicially (which conclusively gives the lie to any claim that the property was in the state court's jurisdiction), which said extra-judicial sale would *only* be proper on proof of want of equity, as a consequence of proceedings for leave to foreclose, and, of course, following due and proper service on the then receiver, who most obviously was, and is, a necessary party to any such proceeding.

By urging that the debtor's real property was in the custody of a state court receiver when, in fact, said receiver had never taken possession of the property nor collected any rents, since there were no tenants and hence no rents to be collected, and by failing to advise the court that it actually intended to cause the property to be sold extra-judicially, rather than in a "foreclosure proceeding", Country Life not only seriously misrepresented the true facts (despite the Referee's attempt to gloss over this issue at p. 5 of his Certificate on Review [R. p. 67, lines 3-7, incl.), but County Life was merely "playing one court against another", and acting in dubious faith as to both. Since it caused the property to be sold extra-judicially on the day after the January 13, 1966 hearing, it can scarcely be conceived that Country Life did not so intend to proceed at the time of the hearing, and hence its failure to so advise the court coupled with its false, written representation that its Superior Court action was a "foreclosure proceeding", if not a fraud, certainly casts a taint on the order so procured regardless of the Referee's apparent aversion to recognize that Country Life's conduct falls short of the standards normally enforced in courts of equity.

Fraud or misrepresentation will vitiate even what might otherwise be a valid, if technical, objection to the summary jurisdiction of the bankruptcy court. Thus, in *In re Southern Metal Products Corp.* (D.C., Ala., 1939), 26 F. Supp. 666, the court held: (1) In summary proceeding by bankruptcy trustee to compel a receiver appointed by the state court, in proceedings to foreclose a mortgage executed by the bankrupt, to turn mortgaged property over to the trustee, the bankruptcy court could inquire into the receiver's claim to the property for purposes of ascertaining whether the summary proceeding was appropriate and could determine whether the trustee's claim was real or merely colorable; (2) the bankruptcy referee has jurisdiction to summarily order a state court receiver to surrender to a bankruptcy trustee, property which had been placed in the possession of such state court receiver in a proceeding to foreclose a mortgage, where execution of the mortgage and institution of the foreclosure and appointment of a receiver were an attempt by the mortgagee to secure an advantage over the bankrupt's other creditors with intent to hinder, delay or defraud the latter.

Certainly the rationale of the decision in *Southern Metal Products* has application here in light of the fact that the order appointing the state court receiver to collect non-existing rents can have no rational explanation save as an attempt to deprive the bankrupt and its creditors, not to mention the junior encumbrancers, of the only avenue whereby the equity in the property could be salvaged.

In Chapter XI, Unlike Ordinary Bankruptcy Proceedings, the Debtor's Ownership of Property Is Sufficient to Confer Upon the Bankruptcy Court Summary Jurisdiction to Adjudicate Controversies Arising Therefrom.

The law is stated in 8 Collier on Bankruptcy, Para. 3.02, pp. 176, *et seq.*, as follows:

> "Section 311, gives the court in which the petition is filed 'exclusive jurisdiction of the debtor and his property, wherever located'. *That jurisdiction over property rests on ownership of property, as distinguished from possession.* There is no comparable provision in Chapters I to VII. With some exceptions, where a third party to an ordinary bankruptcy proceeding under Chapters I to VII has possession of the property and asserts a substantial adverse claim thereto, the bankruptcy court does not acquire summary jurisdiction over a controversy with respect to the property, even though ownership of the property is in the bankrupt. *As a result of Sec. 311, however, the court in a proceeding under Chapter XI has summary jurisdiction in that situation.*" (Emphasis added) .

The editors proceed to point out at pages 179 through 180, that a Chapter XI court also has summary jurisdiction over property in possession of the debtor, as in ordinary bankruptcy proceedings, irrespective of ownership, and points out, at p. 181:

> "Under Sec. 311, *either* ownership in the debtor at petition filed, or possession of the court, is a basis for summary jurisdiction over controversies." |Emphasis added).

Concluding the discussion of this issue, the editors state the following at page 182, with reference to the "extension" of summary jurisdiction under Sec. 311:

> "The only extension in summary jurisdiction made by Sec. 311, is to give the bankruptcy court summary jurisdiction over controversies with respect to property in the possession of a third party who does not assert a substantial claim of ownership thereto, although such third pary does assert other substantial claims against that property."

Applying the foregoing rules to the instant case, it is submitted that it is undisputed that ownership to the real property in controversy was in the debtor as of the date of bankruptcy. Accordingly, the bankruptcy court had, and still has, summary jurisdiction to determine any and all controversies with reference thereto. It is further submitted (1) that the state court did *not* have possession, (2) that Country Life had no intention to foreclose judicially, indeed, could *not* have done so since its action was for "Specific Performance", as distinguished from a foreclosure proceeding, and (3) that the alleged rule that once having given up possession, the court cannot reacquire the same has *no* application where the order pursuant to which the extra-judicial sale was held, was procured by a fraud on the court, or any inequitable conduct proximating fraud. (See *Parker v. Checker Taxi Co.*, 238 F. 2d 241).

Although as previously noted, the jurisdiction of a court of bankruptcy is even more pervasive in a Chapter XI proceeding than in an ordinary bankruptcy proceeding, because title to real property in the debtor, regardless of "possession", is, itself, sufficient to confer

upon the court summary jurisdiction, nevertheless, this court had, and has, jurisdiction over the realty involved in the instant case in any case, because the so-called state court "receivership" was so obviously spurious, if not fraudulent, that the alleged "adverse" claim cannot be regarded as more than "colorable", if that. Furthermore, since the property was vacant at the date this proceeding was commenced, it was, accordingly, in the constructive possession of the debtor and this court. (See, generally, 5 A Remington on Bankruptcy, Sec. 2361, p. 94; also, Sec. 2374, pp. 118, 119).

Additionally, even assuming, *arguendo,* that the state court receiver *had* taken possession of the debtor's realty (which was *not* the fact), even in such circumstances, it is doubtful that such assumed fact would deprive this court of jurisdiction, since the action was *not* a "foreclosure proceeding", and appellees, thus far at least, have been unable to cite a single decision holding that a non-foreclosure, state court receivership deprives the bankruptcy court of jurisdiction.

However, recognizing the more pervasive jurisdiction under Chapter XI than in so-called "straight bankruptcy", appellees belatedly (after two (2) sessions of oral argument and one set of Points and Authorities), have asserted the wholly groundless argument that the proceeding was "converted" to an ordinary bankruptcy proceeding on January 13, 1966, because the debtor's counsel inadvertently filed with the debtor's schedules the printed first page Wolcott form, which, of course, is appropriate for an ordinary, voluntary proceeding, but inappropriate to an arrangement proceeding. Not only did counsel for the debtor and the court recognize and treat the case as a Chapter XI proceeding at all

times, but so also did counsel for Country Life. Thus, in the latter's Reply Memorandum filed as late as February 15, 1966 [R. pp. 147, 148], the following sginificant language, which is totally inconsistent with its recent argument, appears at page 1, lines 28 to 31, inclusive, as follows:

> "Accordingly, the Court should disapprove the Chapter X petition and dismiss the same, *leaving this case in the posture it was under (sic) Chapter XI proceeding at the time the Chapter X was filed.*" (Emphasis added).

The Fact That the Receiver Was Not a Party to the Proceedings Resulting in the Orders of January 13, 1966, and March 3, 1966, Renders Such Orders Void and Wholly Ineffective as Against Him.

In 9 Collier on Bankruptcy, Para. 10.10, the following is set forth at page 510:

> "Any authorized act by a *debtor in possession* is binding, *in the absence of unusual circumstances,* upon the trustee in the subsequent bankruptcy administration of the proceeding." (Emphasis added).

Obviously, in this case, there was no "debtor in possession" as the present trustee was appointed receiver on January 6, 1966, two (2) days after the petition was filed, and seven (7) days prior to the hearing of January 13, 1966. Also, obviously, it is an utter understatement to say that there was *very* "unusual circumstances" involved in this case.

Since a "debtor in possession" is expressly accorded "all the powers of a trustee appointed under this Act" (Sec. 342), obviously, a final order entered in a pro-

ceeding or hearing to which he is a party, will, in the absence of "unusual circumstances", be binding on a trustee in bankruptcy appointed after the debtor is adjudicated a bankrupt. However, it is equally obvious *that such rule is limited by definition to a "debtor in possession"*, and where, as here, a receiver is appointed, the latter is most certainly *not* bound by an order entered as a consequence of litigation between the debtor and some third party or parties, to which the receiver was not made a party. To hold otherwise would run afoul of the most elementary principles of due process of law. Furthermore, Country Life's complaint that it did not initiate the proceeding out of which the order of January 13, 1966 arose, is no answer at all. Not only should Country Life have brought on proper proceedings for leave to foreclose, but it should also have joined the receiver. Of course, Country Life could not have successfully maintained such a proceeding in light of the very substantial equity in the real property in issue, which fact, presumably, led to its attempt to achieve the same general result by making the misrepresentations heretofore enumerated.

As previously pointed out, there is a vast distinction between an order denying an injunction, based upon representations that real property is in the jurisdiction of a state court receiver in connection with *foreclosure proceedings* commenced prior to bankruptcy, and a petition for leave to foreclose. The latter requires *proof* of lack of equity, which could *not* have been adduced in this case, whereas, of course, the former type of order does not. Again, these considerations amply point up the grave inequity and injustice to the debtor's estate, its creditors, and the junior encumbrancers,

which, unless corrected, has deprived them of the very substantial equity which exists in the real property involved herein.

Since a Chapter XI receiver has the same powers, duties and rights as a trustee in bankruptcy by virtue of Sec. 341 and Sec. 352 of the Bankruptcy Act, the conclusion appears inescapable that such a receiver *must* be made a party to any proceeding out of which an order is entered which divests, or purports to divest, the debtor's estate of property, be it real or personal. To hold otherwise would deprive the receiver, and more particularly, the creditors for whom he is legal representative, of property without due process of law. It is clear, if citation of authority were even necessary, that the constitutional guarantee of the due process clause of the Fifth Amendment to the United States Constitution applies to bankruptcy proceedings (*Louisville Joint Stock Land Bank v. Radford* (1935), 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593; *Alexander v. McDonald* (5th Cir., 1941), 120 F. 2d 72, 73; *In re Rosser* (8th Cir., 1900), 101 Fed. 562, 568; *In re Stephens* (D.C., Tex., 1961), 211 F. Supp. 201, 202; *Hess v. Amidon* (1937), 56 Ohio App. 99, 10 N.E. 2d 26, 28, cert. den., 302 U.S. 706, 58 S. Ct. 26, 82 L. Ed. 546).

In *Alexander v. McDonald, supra,* the court held as follows, at page 73:

> "The record is brief and contains only the pleadings and Orders in the case and several exhibits. We have carefully examined the record and failed to find that Alexander was ever given a hearing or ever notified of any hearing or proceeding affecting his alleged title to the land. All that appears is the unsupported report of the Referee in

which he states that at some previous time, while acting as Conciliation Commissioner, he heard sworn testimony which convinced him that title to the land was in McDonald. This will not do. *Title to property claimed to be owned by a bankrupt may not be adjudicated in such a way. Alexander was and is entitled to have notice of any hearing affecting title to the land so that he might have an opportunity to present whatever evidence of title he might have, with the proceedings subject to review by the District Court. Any other method would be sheer denial of due process of law.*" (Emphasis added).

In light of the foregoing, the language of Referee Bergener's Order of October 28, 1966, to the effect that the Orders of January 13, 1966, and March 3, 1966, had become "final", is obviously violative of the due process clause *to the extent that it purports to hold said Orders "final" and binding as against appellant as receiver, and subsequently trustee in bankruptcy, since he was not a party to the proceedings out of which said Orders issued, and had neither notice nor opportunity to be heard.* Furthermore, the reference to the "finality" of the aforesaid Orders in the Order of October 28, 1966, totally conflicts with the final paragraph thereof, which purports not to "prejudice" the right of appellant to institute "any action or proceeding in a court of appropriate jurisdiction", etc. This latter provision is illusory, since if the Order were allowed by appellant to stand unchallenged, it might well be held *res judicata* so as to bar any right to raise the serious constitutional issues of due process with respect to the Orders of January 13, 1966, and March 3,

1966. In short, the Order of October 28, 1966, is a contradiction on its face, and this fact alone constitutes one of the several glaring flaws in the "theory", suggested in the Certificate on Review, that the Referee had "discretion" to decline to exercise jurisdiction, which "theory" will be considered more fully hereinbelow. These observations, of course, apply with equal force to the District Court's Order of March 8, 1967 [R. pp. 484, 485], insofar as it holds that appellant is bound by the aforementioned Orders.

By Its Action in Seeking Affirmative Relief Herein, Country Life Thereby Consented to the Jurisdiction of the Bankruptcy Court.

Entirely aside from all the reasons heretofore reviewed, which establish the jurisdiction of the bankruptcy court over the real property in issue, a further basis therefor clearly exists as a consequence of the fact that Country Life sought, and was granted, affirmative relief in connection with the Order of March 3, 1966.

The law respecting submission to jurisdiction by consent is well stated in 2 Collier on Bankruptcy, Para. 23.08(5), at pages 547, *et seq.*, as follows:

> "When an adverse claimant to property voluntarily submits the question of his claim for determination by the bankruptcy court, jurisdiction is conferred by consent and the trustee or receiver cannot be heard to object. Nor may the claimant himself thereafter question the exercise of such jurisdiction. (Citing Footnote No. 59, page 548, *inter alia: Barringer v. Lilley*, (9th Cir., 96 F. 2d 607)) *Thus a mortgagee who petitions the bank-*

ruptcy court for payment of the mortgaged debt thereby consents to the court's summary jurisdiction to determine the validity of the mortgage. (Citing, Footnote No. 60, page 59: *In re Platteville Foundry & Machine Co.,* (D.C., Wis.) 147 Fed. 828, and cases there cited; *In re Durham,* (D.C., Md.) 114 Fed. 750; *Chauncey v. Dyke Bros.,* (8th Cir., 119 Fed. 1). Also, *likewise a defendant who seeks affirmative relief by a cross motion or other appropriate pleading thereby consents to the jurisdiction of the court. (In re Engineers Oil Properties Corp.,* (D.C., N.Y., 1947) 72 Fed. Supp. 989." (Emphasis added).

See, also, *Matter of Morris White Holding Co., Inc.* (D.C., N.Y.), 52 F. 2d 499, in which the court held *that a mortgagee's filing of a petition to allow foreclosure in another proceeding constituted a submission to the jurisdiction of the bankruptcy court,* and made it a party to the bankruptcy proceedings.

Applying the foregoing rules to the facts of this case, it is submitted that in substance Country Life procured an order (of March 3, 1966) granting it leave to foreclose, albeit *expost facto,* and without a scintilla of evidence of any character whatsoever, much less evidence that no equity existed in the property for the then bankrupt estate. Again, appellant was *not* a party thereto.

It is further submitted that, if anything, the order of March 3, 1966, is even more improper than that of January 13, 1966, since, as above-noted, it amounts, in substance and effect, to an order *retroactively granting leave to foreclose by an extra-judicial sale, without any evidence whatever to support it.*

The following language from the order, obviously prepared by counsel for Country Life, clearly supports the foregoing analysis. Thus, at page 3 [R. p. 152], lines 20 to 26, inclusive, appears the following:

> ". . . but that Country Life Insurance Co., an Illinois corporation, and First American Title Company, as trustee under the said deed of trust, *should be permitted to enforce the above referred to deed of trust in accordance with the terms thereof and the laws of the State of California, free of any restraint by the bankruptcy court.*" (Emphasis added).

In the order itself (the above quotation being from the lengthy preamble) it provides as follows [R. pp. 152-153]:

> "ORDERED, that all restraining orders heretofore issued in the above proceeding *are declared to have expired of their own force, and that at the present time there are no restraining orders in effect in the above entitled proceeding;* without limiting the generality of the foregoing, the order of January 17, 1966, restraining First American Title Insurance & Trust Company and/or San Mateo County Title Company, as trustee, from delivering the deed evidencing the sale of the real property under the power of sale contained in the above referred to deed of trust, *is declared to be of no present effect;* and it is further
>
> "ORDERED, that Country Life Insurance Co., an Illinois Corporation, First American Title Insurance & Trust Company and/or San Mateo County Title Company, as trustee, *may proceed forthwith to enforce the deed of trust hereinabove*

referred to in accordance with the laws of the State of California, free of any further restraint by the Bankruptcy Court, without limiting the generality of the foregoing, First American Title Insurance & Trust Company and/or San Mateo County Title Company, as trustee, *may deliver its trustee's deed evidencing the sale conducted under the power of sale contained in the deed of trust above referred to.*" (Emphasis added).

Certainly, by any reasonable construction, the above-italicized language constitutes the granting of affirmative relief to Country Life, even though wholly improperly, since it had adduced no evidence whatever that there was no equity for the bankrupt estate in the real property affected. This egregious impropriety in the order does *not,* however, alter the fact *that affirmative relief was very definitely sought by, and granted to, Country Life.* Accordingly, absent all the other grounds therefor, it is submitted that by seeking the affirmative relief of the Court, Country Life thereby clearly submitted itself to the court's jurisidiction, and *cannot* be heard now to object thereto.

The Trustee's Deed to Country Life Was Expressly Subject to the Interest of the Bankrupt Estate.

As alleged in appellant's Application of June 29, 1966, [R. p. 235, *et. seq.*] and as evidence by the trustee's deed appended thereto as "Exhibit A" [R. pp. 249, 250], on its very face, the deed from the First American Title Insurance and Trust Company to Country Life, expressly provides, as follows:

> ". . . said sale being made *subject* to the rights of any Bankruptcy Court or Trustee in Bankruptcy." (Emphasis added).

It is submitted that Country Life, at most, merely eliminated the junior liens, and did *not* acquire the title that clearly stood in the bankrupt (then debtor) at the commencement of this proceeding on January 4, 1966, since the above deed was made explicitly *subject* to the title of this bankrupt estate. Futhermore, by virtue of the above-quoted language of the trustee's deed, Sequoia had at least constructive, if not actual, notice of the interest of this bankrupt estate in and to the real property here in issue.

The Facts of This Case Require the Court's Exercise of Its Exclusive Jurisdiction, and Preclude Any "Discretion" to Decline to Exercise Same.

As heretofore noted, the Referee suggests in his Certificate on Review, that an alternative basis for his Order of October 28, 1966, was an exercise of "discretion" to decline to exercise what we submit was an exclusive jurisdiction over the real property in dispute, so as to permit the matter to be determined, presumably, in the Superior Court of San Mateo County (hardly a convenient forum for the trustee of a presently "no-asset" bankrupt estate pending in the federal court in Los Angeles).

As, also noted previously, the provision that the order in question is "without prejudice" to appellant's right to relitigate the matter elsewhere is highly chimerical and a contradiction in terms, in view of the implicit finding that the Orders of January 13, 1966, and March 3, 1966, are "final", as against appellant, notwithstanding that he was not a party to the proceedings out of which said Orders arose, and had neither notice nor opportunity to be heard in connection therewith, since such finding, if not directly attacked, would probably become *res judi-*

cata, precluding appellant from raising this vital issue of constitutional law in any other forum.

In addition to the foregoing defect in the "theory" that the Referee could properly decline to exercise jurisdiction in his "discretion", it is submitted that the facts of this case are such as to fall within the general rule that exclusive jurisdiction may *not* be surrendered, rather than the narrow "exception" thereto which recognizes such "discretion" where (1) *the best interests of the estate* and all of the parties would be served by allowing the matter to be litigated in a state court; and (2) where the central issue is *some doubtful question of State law.* Neither criteria is applicable in the instant case.

As noted in 1 Collier on Bankruptcy, para. 2.07, pages 156, 157; 5A Remington on Bankruptcy, Sec. 2384, page 135; and 8 Collier on Bankruptcy, para. 301, page 170, generally the exclusive jurisdiction of the bankruptcy court may *not* be surrendered. (*Gross v. Irving Trust Co.* (1933), 289 U.S. 342, 53 S. Ct. 605, 77 L. Ed. 1243; *Isaacs v. Hobbs Tie & Lumber Co.* (1931), 282 U.S. 734, 51 S. Ct. 270, 75 L. Ed. 645; *U.S. Fidelity & Guaranty Co. v. Beay* (1912), 225 U.S. 205, 32 S. Ct. 620, 56 L. Ed. 1055). An "exception" to said general rule is recognized where (1) *the best interests of the estate* and all of the parties concerned would be served by allowing the matter to be litigated in a state court, and (2) where some doubtful or unresolved question of state law is involved. This was the rationale of *Thompson v. Magnolia Petroleum Co.* (1940), 309 U.S. 478, 484, 60 S. Ct. 628, 84 L. Ed. 876, cited in the Referee's Certificate, and all similar cases.

In all cases in which the trustee was required or directed to proceed in the state courts, there was involved some point of state law which was unsettled, and which the federal courts felt should properly be determined by the state courts in the first instance. Thus, in *Thompson, supra*, there was a question as to title under state law to rights of way land; in *Mangus v. Miller* (1942), 317 U.S. 178, 185, 63 S. Ct. 182, 87 L. Ed. 169, there was uncertainty as to state law concerning the effect of a default under a land sale contract involving joint tenant vendees; in *Gramil Weaving Corp. v. Reindeer Fabrics, Inc.* (2nd Cir., 1950), 185 F. 2d 537, 540, the title to certain goods, sold by the bankrupt and under attachment, was uncertain under state law; in *Matter of East Coast Ry. Co.* (D.C. Fla., 1943), 149 F. Supp. 527, the trustee's liability for state taxes was uncertain because the state courts had not construed the tax statutes involved, etc.

That the remission of matters for determinations by state courts represents the "exception", and *not* the rule, was emphasized by Mr. Justice Black, in the *Thompson* opinion, *supra,* for he expressly reaffirmed the principle that the bankruptcy or reorganization court has "an exclusive and non-delegable control over the administration of an estate in its possession." The editors of Collier similarly emphasize the normal applicability of the general rule. Thus, in 1 Collier on Bankruptcy, para. 2.07, the following appears at pages 161, 162:

> "On the other hand, where it is clear that state court decisions have removed an determinative uncertaintly as to the state rule applicable, say, in a property question, the parties should *not* be

remitted to a state court for a disposition of the controversy. (Citing, *inter alia: Matter of Chicago & Northwestern Ry. Co.,* (7th Cir., 1942) 127 F. 2d 1001, cert. den., 317 U.S. 659, 63 S. Ct. 59, 87 L. Ed. 529)". (Emphasis added).

See *Stout v. Green* (9th Cir., 1942), 131 F. 2d 995, holding that a dispute arising from the non-payment of a state liquor license fee by the trustee, and the assertion of a lien for unpaid alcohol taxes need not be remitted to the state court.

The following authorities and decisions clearly support the view that the "discretion" to require the trustee to proceed in a state court is narrowly limited to situations in which (1) *the best interests of the estate* would be served, and (2) where the central issue is an unresolved question of state law:

(1) *In Matter of Chicago & Northwestern Ry. Co., supra,* 127 F. 2d 1001, the court stated the following at p. 1004:

> "Neither applicable statutes nor decisions of Illinois were available at the time *Thompson v. Magnolia Petroleum Co.* was before the Supreme Court. And the difficulties of determining just what should be the decision under Illinois law were persuasively indicated by the different results reached by the two Circuit Courts of Appeal that had attempted determination. The Supreme Court refused to resolve this conflict in order that the important question of property law might not—by accident of federal jurisdiction—be resolved in a way that might prove contrary to the result of some subsequent state court. Accordingly, the court held that the bankruptcy court had abused its dis-

cretion by not sending the matter to the appropriate state court. *However, in our case, no more uncertainty attends the disposition than is present in the decision of most legal questions.*

"Clearly in the light of recent Illinois decisions, there is no such uncertainty as to require sending the case to the state court. *If the matter were referred to the state court, the one certain result would be an increase in the costs of litigation, costs which would diminish the estate of the bankrupt. To refer to the state courts every land question arising in bankruptcy would be to disregard the very objectives of the summary jurisdiction granted to the bankruptcy court. Such was not the rule of the Magnolia case."* (Emphasis added).

(2) *In Matter of J. Rosen & Sons, Inc.* (3rd Cir., 1942), 130 F. 2d 81, a Referee was reversed for "surrendering" jurisdiction over a real property dispute arising in a Chapter XI proceeding, and the Court of Appeals helds as follows, p. 82 and p. 84:

"A court of bankruptcy has summary jurisdiction to determine controversies in regard to property of which it has possession. *The validity of the mortgage should have been decided promptly unless that decision required a determination of an unsettled question of New Jersey law. It was the duty of the Referee promptly to dispose of the questions presented by the petitions of the trustee and Reconstruction Finance.*

"If the Referee was unable to decide these questions, the learned Distruct Judge should have done so. . . . An order granting authority to the Reconstruction Finance Corporation to foreclose its mort-

gage in the state court should have been made *only after an express finding by the court that the mortgage was valid.*" (Emphasis added).

See, also, *In re Fine Arts Corporation* (6th Cir., 1943), 136 F. 2d 28, 30, 31.

Applying the foregoing principles to the facts of the instant case, it is submitted (1) that the "best interests" of the bankrupt estate would most definitely *not* be served by requiring appellant to try the case in San Mateo County, involving as it necessarily would, undue delay not to mention costs, which appellant would either have to advance personally, or attempt to solicit from some or all of the creditors; and (2) there is not only no unsettled issue of state law involved, but to remit appellant to the state court would deprive him of his two strongest positions, viz.: (a) the constitutional question of due process, and (b) the issue of "equity" in the realty.

With respect to the latter point, the existence of the substantial equity in the property is immaterial under state law, but of vital moment under Chapter XI, since the bankruptcy court has a duty to afford a debtor a reasonable opportunity to realize an equity in its real or personal property, to which end it may restrain foreclosure proceedings. In contrast, under the law of California, as well as most states, the existence of even a substantial equity is technically irrelevant and, in itself, no defense to a foreclosure proceeding. Thus, if a mortgage or trust deed is, in fact, in default, and if all the technical prerequisites to foreclosure, or sale under the power of sale, have been met, the fact that even a most substantial equity exists in favor of the hapless mortgagor or trustor is immaterial. Thus, to

remand appellant to the "tender mercies" of state law would deprive him of his strongest position, and, obviously, by no process of logic could such be characterized as being in the "best interests" of the bankrupt estate or its creditors.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the District Court's Order of March 8, 1967, as well as the Referees' several Orders of January 13, 1966, March 3, 1966, and October 28, 1966, should be reversed, and it should be decreed that the real property in controversy is an asset of the bankrupt estate subject only to the existing encumbrances of record.

Respectfully submitted,

JOSEPH S. POTTS,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. POTTS

No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. Douglas Wikle, Trustee in Bankruptcy, for Nevada Henderson Land Co., a corporation,

Appellant,

vs.

Country Life Insurance Company, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief of Appellees, Country Life Insurance Company and Title Insurance & Trust Co.

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No. 21967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. Douglas Wikle, Trustee in Bankruptcy, for Nevada Henderson Land Co., a corporation,

Appellant,

vs.

Country Life Insurance Company, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief of Appellees, Country Life Insurance Company and Title Insurance & Trust Co.

Jurisdiction.

This is an appeal from the Order of March 8, 1967, made by the Honorable Pierson M. Hall, United States District Judge, Central District of California, affirming an order of the Referee in Bankruptcy which had dismissed on jurisdictional grounds a quiet title action brought by Appellant-trustee in bankruptcy [R. 489].[1] This court has appellate jurisdiction under Section 24a of the Bankruptcy Act, 11 U.S.C. § 47a.

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[1]All citations to the record ["R."] are to pages in the Transcript of Record in the Court of Appeals.

The Notice of Appeal is directed only to the District Judge's Order of March 8, 1967, but, curiously, Appellant's Opening

(This footnote is continued on the next page)

Statement of the Case.

On June 30, 1966, Appellant-trustee in bankruptcy filed his application in the bankruptcy court in Los Angeles to quiet title to certain real estate improved with a convalescent hospital facility and located in San Mateo County, California [R. 235]. Appellees Country Life Insurance Company. Sequoia Hospital District and Title Insurance & Trust Co. were named as respondents, as were several others not parties to this appeal, including First American Title Insurance and Trust Company.

Sequoia Hospital District was then in possession of and operating the hospital by virtue of a lease and option agreement made with Country Life Insurance Company on March 31, 1966 [R. 284, 295-296].

The three appellees and First American Title Insurance and Trust Company promptly objected to the summary jurisdiction of the bankruptcy court and moved to dismiss the trustee's application on that ground [R. 264, 294, 359]. Following a hearing at which all parties agreed to submit the jurisdictional matter on the pleadings, attached exhibits and the court's record,[2] the Referee ruled, by order dated Oc-

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Brief prays also for reversal of three orders of the Referee in Bankruptcy. (Op. Br. p. 40). One of the Referee's orders namely, that dated October 28, 1966, was affirmed by the order of the District Judge here appealed from. The other two, dated January 13, 1966 and March 3, 1966 respectively, were never reviewed and became final long ago. Appellant's attempt now to collaterally attack these orders is dealt with in the Argument portion of this brief.

[2]Appellant's Opening Brief states or implies that the trustee was deprived of an opportunity to introduce evidence. (*e.g.*, Op. Br. pp. 2, 9.) This is simply untrue. The Referee had specifically asked whether anyone desired to present testimony or other evidence, and all agreed to submit the case on the written record.

tober 28, 1966, that he lacked summary jurisdiction. Alternatively, he held that under the circumstances of this case, the court should decline to exercise such jurisdiction as a matter of discretion. The dismissal was without prejudice to the trustee's right to bring the quiet title action in an appropriate forum [R. 409-410].

Appellant filed a timely application to review this order [R. 411]. On March 8, 1967, Judge Hall affirmed [R. 484]. Notice of Appeal was filed March 21, 1967 [R. 489].

Statement of Facts.

On January 4, 1966, Nevada Henderson Land Co. commenced the bankruptcy proceeding by filing a plan of arrangement under Chapter XI of the Bankruptcy Act [R. 9].[3] It then owned the real estate which is the subject of the present quiet title action, consisting of a convalescent hospital facility in San Mateo County. The property was subject to various liens and encumbrances, including a first deed of trust held by Appellee Country Life Insurance Company to secure a loan of some $900,000.[4]

The Chapter XI proceeding was immediately referred to Referee in Bankruptcy John E. Bergener for administration. Bankruptcy Act § 22a, 11 U.S.C. § 45a. On the same day, January 4, 1966, upon the bankrupt's application, the Referee issued an *ex parte* order,

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[3]No actual petition under Chapter XI can be found in the record. See Referee's Certificate on Review [R. 3]. The petitions under Chapter X and in straight bankruptcy were filed subsequent to January 4, 1966 as set forth below.

[4]The trustee under this deed of trust was First American Title Insurance and Trust Company, erroneously referred to in the early pleadings in the bankruptcy court as "San Mateo Title Company."

returnable January 13, 1966, temporarily restraining Country Life Insurance Company from enforcing its security [R. 29]. Sale of the property under the power of sale contained in the deed of trust had been scheduled for January 5, 1966.

Timely objection to summary jurisdiction and opposition to the temporary restraining order was filed by Country Life Insurance Company on January 11, 1966 [R. 34].

On January 13, 1966, the bankrupt filed a voluntary petition in bankruptcy and the accompanying schedules [R. 40, 41-55]. Technically, therefore, the nature of the proceeding from that point forward was one of straight bankruptcy, except for the brief period a Chapter X petition was pending as referred to below.

At the hearing on the temporary restraining order on January 13, 1966, Country Life Insurance Company opposed further extension of the stay on the ground the bankruptcy court lacked summary jurisdiction. The argument was that on the date of bankruptcy, the real estate or subject matter of the controversy was in the possession of the Superior Court of San Mateo County by virtue of that court's appointment of a receiver on November 15, 1965 [R. 4].

The bankrupt did not attempt to offer evidence to justify continuance of the restraining order. Rather, counsel for the bankrupt advised the Referee that a Chapter X petition had just been filed [R. 4]. Accordingly, the Referee entered his order of January 13, 1966, declaring that the temporary restraining order of January 4, 1966 was dissolved and of no further force and effect [R. 62].

As noted, the bankrupt filed a petition under Chapter X of the Bankruptcy Act on January 13, 1966 [R. 64]. This petition was never approved under § 141 of Chapter X, 11 U.S.C. § 541. On the day it was filed, Country Life Insurance Company noticed a motion, to be heard by the District Judge, contending that the petition should be disapproved and dismissed on the ground of lack of good faith. Before the District Judge could rule on the issue thus raised, however, the bankrupt filed a withdrawal or dismissal of its Chapter X proceeding. The order of dismissal was signed by the District Judge on March 2, 1966 [R. 149].

Following the Referee's order of January 13, 1966 declaring the temporary restraining order dissolved, Country Life Insurance Company directed the trustee under its deed of trust, namely, First American Title Insurance and Trust Company, to sell the real estate on January 14, 1966 under the power of sale contained in the encumbrance. Such sale was in fact conducted, although the quiet title action subsequently brought by Appellant raises on the merits a question of whether alleged irregularities in the conduct of the sale by First American Title Insurance and Trust Company rendered it invalid or voidable. In any event, Country Life Insurance Company bid in the property at the sale on January 14, 1966. Thereafter, but prior to the delivery of the trustee's deed evidencing the sale, the bankrupt, on January 17, 1966, obtained from the District Judge in the then pending Chapter X proceeding an *ex parte* order restraining issuance of the deed [R. 84]. This restraining order was originally made returnable January 24, 1966, but the restraint was sub-

sequently continued by the Referee in Bankruptcy to February 1, 1966.

At no time after February 1, 1966 were any restraining orders or injunctions in effect. However, the bankrupt did apply for an additional stay [R. 143], and the request was continued from time to time on the Referee's calendar pending a ruling by the District Judge on the question of approval of the Chapter X petition.

On March 3, 1966, the final date to which the matter of the requested stay had thus been continued, a hearing was held before Referee in Bankruptcy Ray H. Kinnison, presiding in the absence of Referee Bergener. As stated before, the order of the District Judge dismissing the Chapter X proceeding was made March 2, 1966. Neither at the hearing on March 3, 1966 nor at any other time theretofore was evidence offered in support of restraining or enjoining enforcement of the deed of trust. After hearing argument, Referee Kinnison made an order dated March 3, 1966, declaring that all previous restraining orders had expired of their own force and permitting enforcement by Country Life Insurance Company of its security according to the terms thereof and California law, free of further restraint by the bankruptcy court [R. 150].

No review was ever taken from either the order of January 13, 1966 or the order of March 3, 1966.[5]

Following the order of March 3, 1966, First American Title Insurance and Trust Company delivered to Country Life Insurance Company the trustee's deed

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[5]Nevertheless, as referred to in note 1 *supra*. Appellant's Opening Brief now prays that these two orders, long since final, be reversed on the present appeal.

evidencing the sale under the power of sale. The document was promptly recorded on March 10, 1966 in San Mateo County [R. 249].

On or about March 31, 1966, Country Life Insurance Company leased the subject real estate to Appellee-Sequoia Hospital District and granted the lessee an option to purchase the property [R. 284]. Sequoia Hospital District has occupied the premises from and after the time of this lease transaction. In particular, it was in possession of the premises at the time Appellant instituted his quiet title action.

Questions Presented.

1. Whether the courts below erred in holding that the bankruptcy court had no summary jurisdiction, over timely objection, to determine the quiet title action brought by the trustee in bankruptcy.
2. Whether, assuming the existence of summary jurisdiction, the bankruptcy court on the facts of this case erred in declining to exercise jurisdiction as a discretionary matter.

Summary of Argument.

Summary jurisdiction of a bankruptcy court to determine controversies respecting property turns either on consent of the adverse party or on possession of the *res* or subject matter.

In the present case, there was no consent, timely objections to summary jurisdiction having been asserted at every opportunity. Nor was there possession of the real estate in question. At the time Appellant trustee in bankruptcy filed his quiet title application, Appellee Sequoia Hospital District was occupying the property. Moreover, even at the date of bankruptcy

the bankrupt did not have possession. Approximately six weeks before the petition, Appellee Country Life Insurance Company had brought suit in the Superior Court for San Mateo County in connection with enforcement of its first deed of trust, and a receiver was appointed. At the same time, the Superior Court enjoined the bankrupt from interfering with possession of the hospital. Thus, from the date of the Superior Court action to the present, either Country Life Insurance Company or the state court receiver or Sequoia Hospital District had possession of the *res,* and the bankruptcy court accordingly lacked jurisdiction.

Moreover, even if there was summary jurisdiction over the quiet title action, the bankruptcy court correctly declined to exercise it as a discretionary matter. The special circumstances justifying the refusal in this case are these: The entire bankruptcy proceeding of Nevada Henderson Land Co. has virtually no connection with the Central District of California, and involves only assets located in San Mateo County in the Northern District; the bankruptcy court in any event could not award complete relief among the parties; the trustee's quiet title action involves on the merits a question of state law as to which there apparently is no clearly governing authority; there appears to be no legitimate creditor interest in this bankruptcy proceeding; bankruptcy courts are well advised to remit the parties to a forum where jurisdiction is clear in cases of doubtful summary jurisdiction; and finally, no review was ever taken from earlier orders in which the bankruptcy court had refused to exercise jurisdiction over Country Life Insurance Company's trust deed enforcement.

ARGUMENT.

I.

The Bankruptcy Court Lacked Summary Jurisdiction to Determine Appellant's Quiet Title Action.

The Bankruptcy Court Had No Possession of the Res or Subject Matter of the Controversy.

Except for those cases where the adverse claimant consents, the bankruptcy court's jurisdiction depends on possession of the subject matter of the controversy.

> "And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy."
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> *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481, 60 S. Ct. 628, 630 (1940).

Ordinarily, as noted, possession is tested for jurisdictional purposes as of the date of the petition. After the filing of the present bankruptcy proceeding, however, the Referee refused to enjoin enforcement of the deed of trust held by Country Life Insurance Company. Thus, the bankruptcy court permitted the sale to be conducted under the power of sale, and authorized possession of the property to be taken by appellees if they did not already have it. Under such circumstances, as will be discussed below, the possession of the *res* which would support reinvocation of summary jurisdiction must relate to the time of the filing of the quiet title action. As of this date, of course, all concede that claimants adverse to the trustee occupied the property.

But even assuming with Appellant that what happened in the bankruptcy court can be ignored and that

jurisdiction of the quiet title action can be established if the bankrupt had possession of the property at bankruptcy, there was no jurisdiction here. On November 15, 1965, about six weeks before bankruptcy, the Superior Court of San Mateo County appointed a receiver in an action brought by Appellee Country Life Insurance Company to enforce its deed of trust. A special application of the general rule respecting the bankruptcy court's summary jurisdiction involves the case where it or the bankrupt lacks possession at bankruptcy because a state court has first asserted its power with respect to the *res*, usually by appointing a receiver.

> *Straton v. New*, 283 U.S. 318, 51 S. Ct. 465 (1931);
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> *Emil v. Hanley*, 318 U.S. 515, 516, 63 S. Ct. 687, 688 (1943).
>
> ("the state court appointed respondent receiver of the rents and profits of the apartment house.").

And see *Bryan v. Speakman*, 53 F. 2d 463, 465 (5th Cir., 1931):

> ". . . it has always been the law that the rule which operates to prevent unseemly conflicts between state and federal equity courts, that that which first acquires jurisdiction of a res retains possession of it. . . ."

The doctrine that prior appointment of a state court receiver precludes the bankruptcy court from exercising summary jurisdiction does not turn upon that receiver's actually having taken possession of the subject property.

What is crucial is the pendency of the prior state court action for the appointment of a receiver.

See:

1 Collier on Bankruptcy, pp. 333-335;

In re Greenlie-Halliday Co., 57 F. 2d 173 (2d Cir., 1932).

There is no merit to Appellant's position that the foregoing rule is inapplicable because the state court receiver appointed in the present case was one for rents only. In the first place, it should be noticed that the receiver involved in the leading case of *Emil v. Hanley*, cited above, was also a receiver only for rents and profits. Thus, it is a doubtful ground of distinction that the receiver's authority might be limited.

Secondly, in the present case it does not appear that the Superior Court for San Mateo County appointed a receiver for such a restricted purpose. The complaint of Country Life Insurance Company in the state court sought much broader relief [R. 268-273]. It requested enforcement of that provision of the deed of trust which enabled the beneficiary, upon default, to "enter upon and take possession of said property or any part thereof . . ." [R. 272]. The prayer included, among other things,

> "That plaintiff, its designated agent or a receiver appointed by this court upon plaintiff's application be allowed into possession of the real property in accordance with the terms of the deed of trust." [R. 273].

Contrary to the suggestion now made by Appellant, the order of the Superior Court dated November 15, 1965 did not merely authorize the receiver to collect rents. More broadly, it also provided:

> "IT IS HEREBY ORDERED that Wilbur B. Baptist be and he is hereby appointed, effective November 15, 1965, receiver of the real property described in plaintiff's complaint and plaintiff's application for appointment of receiver . . ." [R. 275].
>
> "IT IS FURTHER ORDERED that defendant Nevada Henderson Land Co. and its agents and attorneys be enjoined and restrained from collecting the rents from said premises and from interfering in any manner with the property and its possession." [R. 276].

In view of the foregoing, it certainly cannot be argued successfully that the bankrupt was in possession of the subject property at any time while the order of the Superior Court remained in effect. Thus, the fact crucial to the existence of summary jurisdiction as of the date of bankruptcy cannot be established.

That the case commenced as a proceeding under Chapter XI, as distinguished from one in straight bankruptcy, does not affect the question of jurisdiction. First, it is clear that a voluntary petition in bankruptcy had been filed by the debtor by January 13, 1966, the date of the first hearing on the restraining order [R. 40]. Appellant's present contention that this filing was inadvertent hardly changes the legal effect of the act.[6] Unless and until stricken or withdrawn, the vol-

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[6]Mr. Mathes' affidavit in support of Appellant's contention in this respect is somewhat surprising [R. 133]. In a colloquy with

untary petition resulted in an adjudication as a matter of law, Bankruptcy Act §18f, 11 U.S.C. §41f, thus converting the Chapter XI proceeding.[7]

In any event, this court has held that prior appointment of a state court receiver deprives the bankruptcy court of sumary jurisdiction in Chapter XI as well as in ordinary bankruptcy.

Smith v. Hill, 317 F. 2d 539 (9th Cir., 1963).

See also:

Carney v. Sanders, 381 F. 2d 300 (5th Cir., 1967).

There Was No Consent to Summary Jurisdiction.

Appellant's attempt to ground bankruptcy jurisdiction on consent or submission is wholly untenable. Country Life Insurance Company never consented to the summary jurisdiction of the bankruptcy court, either expressly or by implication. At all stages of the proceeding it made timely objections; its capacity was always that of a respondent who resisted the bankruptcy court's power to enjoin enforcement of the security or to determine the quiet title action [R. 34, 264].

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the Referee about the voluntary petition in bankruptcy during the hearing on March 3, 1966, Mr. Mathes did not indicate that there was any mistake in the filing of that document, although he certainly seemed cognizant of its legal effect. See Transcript of Hearing before Referee Kinnison on March 3, 1966, pp. 17 *et seq.*

[7]Moreover, while it does appear that at some stages of the case after January 13, 1966 the debtor might have thought it was still in Chapter XI, the record in this respect is somewhat equivocal. For the captions on various documents filed by Nevada Henderson Land Co. referred to the corporation as a "bankrupt," a designation which would be inconsistent with the status of "debtor" in a Chapter XI proceeding. [E.g., R. 79, 143].

Appellant's argument with respect to consent apparently is based on the fact that the Referee's order of March 3, 1966, declaring all previous restraining orders to have expired, authorized Country Life Insurance Company to enforce its deed of trust in accordance with the terms thereof and California law, free from further restraint by the bankruptcy court. Because counsel for Country Life Insurance Company drafted the order containing such a provision, Appellant contends that "affirmative relief" was requested and that this was tantamount to submission to bankruptcy jurisdiction for all purposes.[8]

Factually, of course, everything possible was done to avoid submitting, and Appellant's argument would seem to fall of its own weight upon analysis. Decisions of this court establish that unless restrained, a secured creditor, without express permission of the bankruptcy court, may validly proceed to enforce his deed of trust or other security even after bankruptcy.

Hardt v. Kirkpatrick, 91 F. 2d 875 (9th Cir., 1937);

Heffron v. Western Loan & Building Co., 84 F. 2d 301 (9th Cir., 1936);

Robinson v. Kay, 7 F. 2d 576 (9th Cir., 1925).

In Chapter XI, "A stay of an act or proceeding to enforce a lien, or of any suit, is not an automatic result of the filing of a petition proposing an arrangement. The granting or withholding of an injunction is left to the

[8]Op. Br. pp. 30-33. Appellant does not, and could not, contend that appellees or First American Title Insurance and Trust Company consented in any way to summary jurisdiction over the quiet title action itself. As seen above, timely objections were filed by all [R. 264, 294, 359].

discretion of the court." 8 Collier on Bankruptcy Par. 3.20[3]. The same is true in straight bankruptcy

The rule, however, is different in Chapter XII, and in Chapter X after approval of the petition, where by specific statutory provision the enforcement of liens is automatically stayed. See Bankruptcy Act §§ 428, 148 11 U.S.C. §§ 828, 548.

Thus, in ordinary bankruptcy and Chapter XI the refusal or failure to enjoin a foreclosure and what Appellant calls the "affirmative relief" of permitting foreclosure are merely opposite sides of the same coin When a bankruptcy court declines to restrain enforcement of a security, it is at the same time permitting the enforcement to proceed outside the bankruptcy court. Since Country Life Insurance Company made actual and timely objection, Appellant cannot in any meaningful sense spell out a consent to jurisdiction from the semantics or form of the order of March 3 1966.

Moreover, consent to bankruptcy jurisdiction is not implied when a party appears before the referee only because he has no alternative. In *Glens Falls Insurance Co. v. Strom,* 198 F. Supp. 450, 458-459 (S.D. Calif., 1961), the court held that the filing of a reclamation application did not constitute a general submission if the secured claimant reserved his objection The creditor's sole alternative would have been to abandon the collateral. *A fortiori,* appearance for the purpose of resisting the continuance of a restraining order or seeking to be freed of it cannot be deemed a consent to jurisdiction.

> *Tamasha Town & Country Club v. McAlester Const. Fin. Corp.*, 252 F. Supp. 80, 87-88 (S.D. Calif., 1966).

Regardless of Whether the Bankruptcy Court Had Jurisdiction at the Date of Bankruptcy With Respect to the Subject Property, Jurisdiction Was Relinquished by the Court and Cannot Be Reasserted in the Quiet Title Action Over Objection of the Adverse Parties.

A. Although the bankrupt on various occasions asked the bankruptcy court to restrain enforcement of the deed of trust held by Country Life Insurance Company, the Referee ultimately declined to grant such relief and permitted the deed of trust to be enforced according to its terms. On January 13, 1966, the court entered its order declaring that a previous *ex parte* temporary restraining order was dissolved and of no further force and effect [R. 62]. Accordingly, on January 14, 1966, Country Life Insurance Company caused the foreclosure sale to be conducted under the power of sale contained in its deed of trust.

However, before the trustee under the deed of trust could deliver the instrument evidencing such sale, the bankrupt, on January 17, 1966, obtained another *ex parte* restraining order which enjoined delivery of the deed [R. 84]. This restraining order eventually expired by its own terms on February 1, 1966 and was never subsequently extended.

Thereafter, the bankrupt again applied for an order restraining delivery of the trustee's deed evidencing the sale under the power of sale [R. 143]. The application, upon which the court declined to issue an order to show cause, was continued on the calendar from time to time, finally coming on for hearing on March 3, 1966. Following the hearing, the court on the same date made its order declaring in effect that all restraining orders theretofore issued had expired of their

own force, that Country Life Insurance Company and the trustee under the deed of trust were free of any restraint by the bankruptcy court, and that they could proceed to consummate the enforcement of the deed of trust [R. 150].

Thereafter, in due course, the "Trustee's Deed Upon Sale" was delivered to Country Life Insurance Company, the successful bidder at the sale held on January 14, 1966 [R. 249]. On March 31, 1966, Country Life Insurance Company leased the subject premises to Sequoia Hospital District for a term of one year, and on the same date granted a one-year option to Sequoia Hospital District to purchase the subject real property for the sum of $1,070,000 [R. 284]. Sequoia Hospital District entered into possession of the premises on or about March 31, 1966 and has since been continuously in possession.

It thus appears clear that the bankruptcy court relinquished possession of the subject real property and relinquished summary jurisdiction, if indeed such possession or summary jurusdiction ever existed.

Even where a bankruptcy court possesses summary jurisdiction to determine a controversy at the inception of the bankruptcy proceeding, once possession of the *res* is relinquished or summary jurisdiction is surrendered the court's power cannot thereafter be reinvoked without the consent of the adverse claimant.

> "If the bankruptcy court voluntarily delivers property to a claimant, the possession of the court is lost, and the claim of the claimant becomes adverse, precluding the court from summarily determining the claimant's right to the property without his consent."
>
> 2 Collier on Bankruptcy, Par. 23.05[5], p. 491.

See also:

Hinds v. Moore, 134 Fed. 221 (6th Cir., 1905);

Cf. Tamasha Town & Country Club v. McAlester Const. Fin. Corp., 252 F. Supp. 80, 89 (S.D. Calif., 1966).

In this case, when the bankruptcy court refused to continue the restraining order, Country Life Insurance Company was free to enforce its encumbrance. Any possession of the property taken by Country Life Insurance Company or its successor following sale under the power of sale, constitutes an adverse possession for the purpose of summary jurisdiction over the quiet title action, regardless of who had possession theretofore.

B. As seen above, no review was ever taken from the orders of January 13, 1966 and March 3, 1966, as a result of which Country Life Insurance Company enforced its security. Apparently recognizing that these orders, if not set aside, amount to a relinquishment of jurisdiction, and that the time for review has long since expired, Appellant now attacks them collaterally on two grounds: First, he contends that they resulted from misrepresentations made to the court; and secondly, he asserts that they were ineffective because the receiver in bankruptcy was not a party to the proceedings on the restraining orders.

1. The alleged misrepresentations are said to concern the nature of the state court receivership and the intention of Country Life Insurance Company to enforce its deed of trust as soon as the restraining order was lifted. This argument is an unworthy one. In the first place, the Referee who was allegedly deceived has stated in his Certificate on Review that the contention "is without factual foundation." [R. 6].

Secondly, the actual order of the state court appointing the receiver was before the Referee on January 13, 1966 when he ruled that the restraining order should not be continued. Thus, it is difficult to understand how the court could have been misled as to the nature of the receivership.

Thirdly, it is hardly likely that the court could have misunderstood Country Life Insurance Company's intention with respect to prompt enforcement of its deed of trust. The obvious purpose in resisting the continuance of any restraining order issued by a referee is to enable the enjoined party to proceed with the enjoined conduct without further interference by the bankruptcy court.

Finally, as the Referee made clear in his Certificate on Review, the restraining order was not continued on January 13, 1966 because the bankrupt offered no evidence justifying a continuance [R. 4].[9] This ground was wholly independent of the jurisdictional argument made by Country Life Insurance Company in opposing the restraining order.

2. That the receiver in bankruptcy was not a party to the proceedings on the restraining orders is not crucial. Nothing which the bankruptcy court has determined in its order dismissing Appellant's quiet title action purports to bind the receiver or trustee on the merits of the controversy respecting the rights in the

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[9]Throughout Appellant's Opening Brief there seems to be a misconception respecting the burden of proof in restraining order matters. He argues that Country Life Insurance Company should not have been permitted to foreclose because it did not prove that there was no equity in the real estate. Obviously, however, the one seeking the restraining order or injunction must produce the evidence to support it [Cf. Fed. Rules of Civ. Proc., R. 65].

subject real estate. There has been no decision on the merits as to whether an equity exists in the property,[10] or whether the foreclosure under the power of sale and the deed evidencing it were valid or defective as a matter of California law. All that has been held in the proceeding below is that Appellant should attempt to enforce his rights in a plenary suit in an appropriate forum. Thus, Appellant's due process contention is without substance.

Appellant's argument that the receiver in bankruptcy was not made a party to the proceeding on the restraining order also ignores the fact that the receiver chose never to intervene, despite his appointment on January 6, 1966, nearly two months before the order of March 3, 1966 [R. 33]. It must be remembered that Country Life Insurance Company, as respondent, was resisting the bankruptcy court's jurisdiction and had no obligation to bring in additional parties. Indeed, it might have jeopardized its objection to jurisdiction if it had attempted to invoke the court's power over other persons.

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[10]Appellant's argument that there was a large equity in the property over and above the encumbrances possibly has relevance if he institutes a plenary suit, but it does not go to the question of whether summary jurisdiction exists with respect to the quiet title action. In any event, Appellant seems to have a tendency at the present time to overestimate the propery's value. In his own Application for Order to Show Cause Re Sale of Real Property, filed April 25, 1966, he indicated that a sale of the property for $1,200,000 would be reasonable if no higher bids were received at the hearing [R. 158]. But the total valid encumbrances as of the date of bankruptcy, according to Schedule A-2 of the bankrupt's schedules, was $1,272,000 plus interest. [R. 43]. Thus, only by a voluntary reduction of the claims of junior lienholders can Appellant spell out an equity. And the alleged offer to reduce the junior secured claims came only after they had been eliminated by the foreclosure under the senior trust deed held by Country Life Insurance Company. Moreover, even with the alleged vol-

II.

The Bankruptcy Court Did Not Err in Refusing as a Discretionary Matter to Exercise Summary Jurisdiction Over the Quiet Title Action.

That a bankruptcy court may properly decline to exercise summary jurisdiction even when it exists, directing the parties to litigate in another court as a matter of discretion, convenience, or comity, is a well recognized principle.

See, *e.g.*,

In re Terrace Lawn Memorial Gardens, 256 F. 2d 398 (9th Cir., 1958);

Glens Falls Insurance Co. v. Strom, 198 F. Supp. 450, 460 (S.D. Calif., 1961);

2 Collier on Bankruptcy, Par. 23.04[3], and cases cited at n. 44;

2 Collier on Bankruptcy, Par. 23.19, p. 634.

Any one of a number of special circumstances existing in the present case justify the refusal to exercise summary jurisdiction as a matter of discretion:

Bankruptcy Courts Properly May Decline to Decide a Case on the Merits When the Jurisdictional Question Is Close.

Where, as here, the existence of summary jurisdiction is doubtful, bankruptcy courts are well advised to avoid the jurisdictional problem and to remit the parties to another forum. The contrary course often leads to lengthy litigation on the merits and time con-

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untary reduction of the junior lien claims, there was no equity in the property if the price of $1,070,000, set forth in the purchase option granted to Sequoia Hospital District, be deemed to reflect the fair value of the real estate [R. 284, 285].

suming, costly appellate proceedings, with an eventual reversal on the technical jurisdictional ground and the need to start over again in an appropriate court. A recent case in point in the Ninth Circuit is *Suhl v. Bumb,* 348 F. 2d 869 (9th Cir., 1965).

In *Ford v. Magee,* 160 F. 2d 457, 460 (2d Cir., 1947), Judge Learned Hand admonished referees in bankruptcy not to make this mistake:

> "The result is one more illustration of what, one would suppose, had been proved often enough already: i.e., that it is almost a mistake to seek a conclusion in situations of this sort by the short cut of a summary proceeding. Time and money are spent, the controversy remains undecided, the administration of the estate is delayed and further prosecution of the claim is chilled. . . . [N]ot much time would have been gained, even if the proceeding had succeeded; and now that it has failed, all must be begun again, or the claim must be abandoned. *We cannot too insistently urge upon trustees not to proceed in this way; we cannot too seriously impress upon referees the duty of discouraging in every way possible those trustees who do so proceed.*" (Emphasis added).

The Bankruptcy Court Could Not Have Awarded Complete Relief Among the Parties.

There are several respondents named in Appellant's quiet title action, but their rights among themselves can be determined only in an appropriate plenary suit. For example, if respondent First American Title Insurance and Trust Company, the trustee under the deed of trust, conducted an improper sale under the power

of sale and thus prejudiced the beneficiary, respondent Country Life Insurance Company, the latter might well have a claim for damages against the former. The bankruptcy court, of course, could not award such relief. Similarly, if the title acquired by Country Life Insurance Company as a result of the sale was defective, it might be liable to respondent Sequoia Hospital District to which it granted an option to purchase. Again, the bankruptcy court could not adjust the rights between these parties. Moreover, since the only possible cause of action the trustee in bankruptcy has against respondent First American Title Insurance and Trust Company and respondent Title Insurance & Trust Co. is *in personam*, a judgment on such claim could be obtained only in a plenary suit absent consent of the adverse parties. *Cf. Suhl v. Bumb*, 348 F. 2d 869 (9th Cir., 1965).[11]

Under these circumstances, the Referee rightfully concluded that fairness required the case to be heard by a court which could fully grant the appropriate relief and adjust all of the rights among the litigants.

A Bankruptcy Court in Los Angeles Is Not the Most Appropriate Venue for an Action to Determine Rights in Land in San Mateo County.

The real estate in question is a hospital facility situated in San Mateo County. A court sitting in that county would thus seem to be the proper venue for Appellant's quiet title action. Certainly it was not an abuse of discretion for the bankruptcy court so to conclude.

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[11]On March 13, 1967, Appellant dismissed First American Title Insurance and Trust Company from the quiet title action [R. 487]. Thus, this respondent is not an appellee here.

In passing, it might be noted that the entire bankruptcy proceeding of Nevada Henderson Land Co. has little connection with the Central District of California. The bankrupt is a Nevada corporation. It had no assets within the Central District [R. 48-55], and although it represented its business address as Beverly Hills [R. 40], the statement is questionable in that the corporation's sole business activity concerned the hospital in San Mateo County.

No Review Was Ever Taken From the Orders of January 13, 1966 and March 3, 1966.

Earlier it was demonstrated that the bankruptcy court's orders of January 13, 1966 and March 3, 1966, refusing to enjoin enforcement of the Country Life Insurance Company deed of trust, amounted to a complete relinquishment of any previously existing summary jurisdiction over the real estate in question. Such jurisdiction could not be reinvoked without consent of the adverse parties. But even if this was not so, neither of the two orders was ever reviewed, nor was there any attempt to have them vacated. In reliance on the fact that the bankruptcy court had refused to stay the foreclosure proceeding, the sale under the deed of trust was conducted, the property was bid in, the deed was delivered and recorded, a lease and option agreement was executed, and Appellee Sequoia Hospital District operated the premises for several months before Appellant commenced the quiet title action and made his collateral attack on the two orders. Under these circumstances, the bankruptcy court quite understandably declined at such late date to reassert summary jurisdiction if any existed.

Appellant's Quiet Title Action Raises on the Merits an Unsettled Question of Local Law.

On the merits, Appellant's quiet title action relies on alleged irregularities in the conduct of the sale under the power of sale contained in the Country Life Insurance Company deed of trust. This contention, particularly the effect, if any, of the unusual recitations in the deed evidencing the sale, raises a question of California property law as to which there apparently is no clearly governing authority. The bankruptcy court properly may abstain from deciding an issue under these conditions since the state forum is the only one with the power to declare the rule of property law authoritatively.

Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S. Ct. 628 (1940).

There Seems to Be No Legitimate Creditor Interest in the Nevada Henderson Co. Bankruptcy Proceeding.

There is yet another persuasive reason why the bankruptcy court should abstain from hearing the merits of the quiet title action, namely, that it is extremely doubtful there is any legitimate, unsecured creditor interest in the bankruptcy proceeding at all. The original schedules indicate virtually no unsecured creditors other than a former stockholder [R. 44].[12] And although the six-month period for filing claims under Section 57n of the Bankruptcy Act, 11 U.S.C. §93n, expired

---

[12]On June 30, 1966, about six months after filing the original schedules, the bankrupt sought and was granted leave to amend the schedules to add three relatively minor creditors [R. 253-255]. None of these, however, filed an actual claim within the time permitted by law. Interestingly, the amendment to the schedules and Appellant's quiet title action were filed the same day.

September 29, 1966,[13] only one claim has been filed in the case [R. 443]. That sole claim, made by the bankrupt's former stockholder, apparently represents the price the corporation agreed to pay for a repurchase of its own shares, a debt of questionable validity on its face [R. 442].

Conclusion.

For the foregoing reasons, the Order of the Honorable Pierson M. Hall, United States District Judge, dated March 8, 1967, should be affirmed.

Respectfully submitted,

QUITTNER, STUTMAN, TREISTER & GLATT and
A. J. GILBERT,
By GEORGE M. TREISTER,
Attorneys for Appellees Country Life Insurance Company and Title Insurance & Trust Co.

[13]The first meeting of creditors was March 29, 1966.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE M. TREISTER

No. 21967

IN THE

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C. DOUGLAS WIKLE, Trustee in Bankruptcy, for NEVADA HENDERSON LAND CO., a corporation,

Appellant,

vs.

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On Appeal From the United States District Court
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BRIEF OF APPELLEE SEQUOIA HOSPITAL DISTRICT

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dismissed on jurisdictional grounds a quiet title action brought by Appellant-trustee in bankruptcy. This court has appellate jurisdiction under §24a of the Bankruptcy Act, 11 U.S.C. §47a.

STATEMENT OF THE CASE

This appellee has read and examined the APPELLANT'S OPENING BRIEF and the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY. This appellee believes that the brief for appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY constitutes a full and sufficient response to the APPELLANT'S OPENING BRIEF. A repetition of the points and authorities therein contained would merely swell the record and accomplish no useful purpose. This appellee, therefore, adopts in its entirety the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY as a response on its own behalf. Certain additional comments, however, should be made on the part of appellee SEQUOIA HOSPITAL DISTRICT.

STATEMENT OF FACTS AND QUESTIONS PRESENTED

Appellee SEQUOIA HOSPITAL DISTRICT respectfully refers this Honorable Court to pages 3 through 7 of the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY wherein the facts of this matter are stated in detail.

SUMMARY OF ARGUMENT

Summary jurisdiction of a bankruptcy court in a Chapter XI proceeding to adjudicate controversies with respect to property may be based upon either actual or constructive possession of such property by the debtor or the bankruptcy court or upon consent of the adverse party, but not upon the sole fact that the debtor held legal title to such property at the time his petition was filed. In the instant case neither the debtor nor the bankruptcy court had possession of the property in question when the debtor's petition was filed. Rather, such possession was in the state court receiver, appointed by the Superior Court of San Mateo County. Furthermore, no adverse party consented to the jurisdiction of the bankruptcy court, timely objections to summary jurisdiction having been filed [see, e.g., R. 34, 185, 264, 294, 359.]

Even if the bankruptcy court did have summary jurisdiction of this matter, it correctly exercised its discretion in refusing to exercise such jurisdiction. Appellee Sequoia Hospital District would have been prejudiced had the bankruptcy court attempted to decide this matter, since a full adjudication of its rights is possible only in a plenary action.

ARGUMENT

8 Collier on Bankruptcy, Par. 3.02, pp. 176-182 (quoted by appellant in its opening brief at pp. 23-24) states that a Chapter XI court has summary jurisdiction over controversies arising out of property either owned by the debtor at the time his petition was filed or in his actual or constructive possession at that time. Perhaps this was the law under former Section 74 of the Bankruptcy Act (see 9 Remington on Bankruptcy, §3573, pp. 214-15 [6th ed. 1955]), but today, as stated in 9 Remington on Bankruptcy §3574, pp. 217-18 (6th ed. 1955):

> "It is well settled that jurisdiction of a bankruptcy court in ordinary bankruptcy proceedings does not extend to property which, although asserted by some of those in interest to belong to the bankrupt and his estate, is, at the time of institution of the proceedings, in

possession of one claiming it adversely. This principle seems now to apply with full force to arrangement proceedings under Chapter XI, although there were exceptions to its application under former Section 74. Thus it has been held that Chapter XI does not confer on the bankruptcy court any greater jurisdiction to supersede prior receiverships than is conferred in ordinary bankruptcy." (Emphasis added.)

Thus, in Sada Yoshinuma v. Oberdorfer Insurance Agency, 136 F.2d 460, 461 (5th Cir. 1943), a proceeding under Chapter XI, the court stated:

"[T]he power of the bankruptcy court in proceedings under Chapter XI is not greater than that of the court in ordinary bankruptcy proceedings. The filing by the bankrupt of his arrangement petition had no more effect to oust the jurisdiction of the State Court than the filing by his creditors of an involuntary petition in bankruptcy had."

Similarly, In re California Paving Co., 95 F.Supp. 909 (N.D. Cal. 1951), again involved a petition for a Chapter XI arrangement. The court there held an exercise of summary jurisdiction to be improper, stating:

"As stated by the Supreme Court in Thompson v. Magnolia Petroleum Co., supra, 'Bankruptcy

> Courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy. [309 U.S. 478, 60 S. Ct. 630.] This rule has been applied in arrangement proceedings. See Lockhart v. Garden City Bank & Trust Co., 2 Cir., 116 F.2d 658."

See also Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1954), and In re Sullivan, 113 F.Supp. 70 (N.D. Cal. 1953), where the law of straight bankruptcy with respect to summary jurisdiction was held applicable to Chapter XI proceedings as far as possession is concerned.

The cases cited in Collier in support of the proposition that a Chapter XI court may exercise summary jurisdiction over controversies arising out of property owned or possessed by a debtor are less than decisive. A brief review of those decisions will demonstrate their inadequacies.

In re Journal-News Corp., 193 F.2d 492 (2nd Cir. 1951), was a per curiam decision dealing with the extent of summary jurisdiction of a Chapter XI court. It was there held that since a debtor corporation has no property interest in shares of its own stock, sales of such shares by third party shareholders could not be enjoined by the bankruptcy court. This case simply does not

treat our problem.

In re Commonwealth Bond Corp., 77 F. 2d 308 (2nd Cir. 1935), also cited by the Collier editors, dealt with the extent of summary jurisdiction of a bankruptcy court in a reorganization proceeding under old Section 77B of the Bankruptcy Act of 1933. There, the debtor held certain property as a fiduciary. An action was brought in a state court to have the debtor removed as "trustee," and thereafter the debtor filed his petition under Section 77B and sought to stay the state court action. In denying the stay, the Court of Appeals merely held that summary jurisdiction could not be based solely on the debtor's possession of property in a fiduciary capacity.

Finally in support of their position, the Collier editors cite Texas Co. v. Hauptman, 91 F. 2d 449 (9th Cir. 1937), again a case decided under old Section 77B. There the debtor owned an interest in a preferred mortgage on a ship. Subsequent to the debtor's petition under 77B, appellant caused the Admiralty court to seize the vessel. The bankruptcy court restrained the libel proceedings. On appeal to this court, however, the temporary restraining order was dissolved, except insofar as the debtor's interest was affected. This court quoted The Rock Island Bridge, 6 Wall. (73 U.S.) 213, 215, 18 L. Ed. 753 to the effect that:

> "A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of

the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages."

It is difficult to see how, from such a specialized set of facts, it can be rationalized that in all cases ownership alone confers summary jurisdiction over the property on the Bankruptcy Court.

The conclusion suggested by the foregoing discussion, despite indications to the contrary in 8 Collier on Bankruptcy, supra, is that either actual or constructive possession of property by the debtor or the bankruptcy court is necessary to confer summary jurisdiction on a bankruptcy court in either a straight bankruptcy or a Chapter XI proceeding. No court has indicated disapproval of decisions such as Emil v. Hanley, 318 U.S. 515, 63 S.Ct. 687, 87 L.Ed. 954 (1943); Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 60 S.Ct. 628, 84 L.Ed. 876 (1940); Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L. Ed. 1060 (1931); Carney v. Sanders, 381 F.2d 300 (5th Cir. 1967); Smith v. Hill, 317 F.2d 539 (9th Cir. 1963) and Bryan v. Speakman, 53 F.2d 463 (5th Cir. 1931). In fact, no rational explanation of the above cases could be made if ownership of property alone were a basis for summary jurisdiction.

If, under any circumstances, it could be argued that title alone confers summary jurisdiction upon the bankruptcy court in Chapter XI proceedings, then such title would have to be both legal and equitable title and the debtor should also have the right to immediate possession if it does not have such possession in fact. Only by incorporating these additional elements would such a proposition in any way be consistent with the overwhelming body of law on this subject. However, in the present case the debtor did not have the right to possession because of the pending State court proceeding which was commenced in aid of enforcement of a non-judicial lien. Furthermore, even assuming arguendo that appellant's theory is correct, it should be noted that apparently the factual and legal situation of the case now before this Honorable Court prevent the application of his theory. As pointed out in the Referee's Certificate on Review [R. 3] no actual petition under Chapter XI can be found in the record. At the time the orders being appealed from were handed down there was a Voluntary Petition in Bankruptcy pending [R. 40], while no proceedings under Chapter XI were pending.

Under Bankruptcy Act §18f, 11 U.S.C. §41f, the filing of a voluntary petition in bankruptcy results in an adjudication as a matter of law, converting the Chapter XI proceeding into one of straight bankruptcy. Therefore, the law of straight bankruptcy should apply in this case, and since neither appellant

nor the bankruptcy court had actual or constructive possession of the property in question, the bankruptcy court does not have summary jurisdiction over the controversy.

APPELLEE SEQUOIA HOSPITAL DISTRICT WILL BE PREJUDICED UNLESS THE ORDER OF MARCH 8, 1967, IS AFFIRMED.

Appellee COUNTRY LIFE INSURANCE COMPANY purchased the real property in question on or about January 14, 1966, upon the exercise of the power of sale in a trust deed on the property. Said sale was conducted by First American Title Insurance and Trust Company, a respondent in the District Court, but since dismissed from this action [R. 487]. On or about March 31, 1966, appellee COUNTRY LIFE INSURANCE COMPANY leased the real property in question to appellee SEQUOIA HOSPITAL DISTRICT and in conjunction therewith gave lessee SEQUOIA an option to purchase the property [R. 284, 295-96]. Appellee SEQUOIA HOSPITAL DISTRICT has never submitted to the summary jurisdiction of the bankruptcy court to try the issue of its leasehold title, possessory interest, and option right. Furthermore, there has been no compliance with Section 21(g) of the Bankruptcy Act, 11 U.S.C. §44(g), and even if this appellee had searched the record of the within proceeding on the date that it had acquired its leasehold title, it would have discovered only the order of March 3, 1966 of

Referee Kinnison [R. 150], permitting the conveyance under which this appellee claims. The fact that the deed may recite that the property was sold pursuant to orders in bankruptcy, therefore, would not alert anyone to any possible infirmities by reason thereof.

The bankruptcy court has never had jurisdiction over the subject property, and if such jurisdiction did exist at the time of the order entered by Referee Kinnison, that order confirmed the validity of such title as this appellee derived by reason of the sale under the deed of trust and the subsequent lease and option right.

Should the foreclosure sale be held invalid, the rights of the several appellees herein can only be determined by a plenary suit. As is so adequately stated in the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY, at pages 22 and 23:

> "[I]f respondent First American Title Insurance and Trust Company, the trustee under the deed of trust, conducted an improper sale under the power of sale and thus prejudiced the beneficiary, respondent Country Life Insurance Company, the latter might well have a claim for damages against the former. The bankruptcy court, of course, could not award such relief. Similarly, if the title acquired by Country Life Insurance Company

as a result of the sale was defective, it might be liable to respondent Sequoia Hospital District to which it granted an option to purchase. Again, the bankruptcy court could not adjust the rights between these parties. Moreover, since the only possible cause of action the trustee in bankruptcy has against respondent First American Title Insurance and Trust Company and respondent Title Insurance and Trust Company is in personam, a judgment on such claim could be obtained only in a plenary suit absent consent of the adverse parties. Cf. Suhl v. Bumb, 348 F.2d 869 (9th Cir., 1965)."

Accordingly, the Referee properly determined that the Superior Court of San Mateo County is the proper place for a trial involving rights in real property located in that county.

CONCLUSION

For the reasons set forth in the brief of appellees COUNTRY LIFE INSURANCE COMPANY and TITLE INSURANCE & TRUST COMPANY and for the reasons set

forth herein, the order of the Honorable Pierson M. Hall, United States District Judge, dated March 8, 1967, should be affirmed.

Respectfully submitted,

GENDEL, RASKOFF,
SHAPIRO & QUITTNER

By BERNARD SHAPIRO

Attorneys for Appellee
Sequoia Hospital District

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Bernard Shapiro
BERNARD SHAPIRO

No. 21967

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vs.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

The Mere Dissolution of a Temporary Restraining Order Due to the Debtor's Failure to Present Evidence, Does Not Constitute Permission for Leave to Foreclose Extra-Judicially, or Otherwise.

At page 19 of its brief, Country Life suggests in a footnote, that Appellant is laboring under a "misconception respecting the burden of proof in restraining order matters", noting that under Rule 65, Fed. Rules of Civil Proc., the one seeking the injunctive relief must produce evidence to support it. It is submitted that the

real "misconception" is Appellee's failure to distinguish between the procedural burden of proof in connection with restraining orders, and *the substantive burden* on a secured creditor seeking to foreclose on a debtor or bankrupt's realty, to establish by competent evidence, lack of equity, as a condition precedent to being granted leave to foreclose.

Obviously, anyone seeking a restraining order has the procedural burden of proof. However, and this is perhaps the core issue involved, since a post-bankruptcy foreclosure, or sale under the power of sale, without permission of the bankruptcy court is, at least, voidable (with one possible "exception" to be noted hereinbelow), *the real and substantive burden is on the secured creditor to establish lack of equity in the debtor or bankrupt's real property.* The mere dissolution of the temporary restraining order for technical reasons, and not on the merits (*e.g.,* as here, because the debtor simply abandoned the matter as "moot" as a consequence of its filing of a Chapter X Petition) clearly does *not* amount to an affirmative order granting leave to foreclose, and Country Life's repeated contentions to the contrary are glaring *non sequiturs,* a graphic example of which appears at page 15 of said Appellee's Brief, as follows:

> "When a bankruptcy court declines to restrain enforcement of a security, it is at the same time permitting the enforcement to proceed outside the bankruptcy court."

Clearly, the above conclusion, for which no authority is cited, simply does not follow. The obvious flaw in so sweeping a generality *is the failure to consider the basis for the court's refusal to restrain.* Thus, if fol-

lowing a full trial on the merits, the bankruptcy court should enter findings, adequately supported by the evidence, that no equity exists for the debtor or bankrupt in and to the property in issue, and appropriate conclusions of law and an Order refusing to continue the restraint, and granting leave to foreclose, Appellee's conclusion would be correct. However, where, as here, the court's refusal to restrain is predicated upon mere technical reasons, not going to the merits of the issue of equity in the property, then the court's refusal most obviously does *not* constitute a permission to proceed to sell or foreclose. In short, only when the refusal to restrain results from a trial on the merits, on the issue of the presence or absence of equity, can such refusal be interpreted as a permission to foreclose.

In addition to the authorities cited in Appellant's opening brief, pages 14 to 19, for the proposition that extra-judicial sales, after bankruptcy and without the permission of the bankruptcy court, are voidable (*e.g.*, 5A Remington on Bankruptcy, §2357, §2374; *Re Hasie* (D.C., Tex., 1913), 206 Fed. 789; 8 Collier on Bankruptcy, p. 264, footnote No. 10 and p. 272; *Lockhart v. Garden City Bank & Trust Co.* (2nd Cir., 1940), 116 F. 2d 658), this court in a 1967 decision, *Groves v. Fresno Guarantee Sav. & Loan Ass'n*, 373 F. 2d 440, stated the following at page 443:

> "But when the bankruptcy proceeding intervened Appellee could no longer institute such a suit nor take any other steps to enforce its lien, without permission of the bankruptcy court. See *Investors Syndicate v. Smith*, 9 Cir., 1939, 105 F. 2d 611, 621. Accordingly, Appellee's only recourse was in the bankruptcy court."

(See, also, *Pasadena Investment Co. v. Weaver* (9th Cir., 1967), 376 F. 2d 175, 178; and *Loyd v. Stewart & Nuss, Inc.* (9th Cir.), 327 F. 2d 642, 645).

The one possible "exception", heretofore mentioned, to the rule that a post-bankruptcy foreclosure, without the bankruptcy court's permission, is, at least, voidable, is the situation in which a legitimate, judicial foreclosure proceeding, commenced prior to bankruptcy, is concluded thereafter in a so-called "straight bankruptcy" proceeding. (In a Chapter XI case, the foreclosure could, at least, be restrained (§314) of the Bankruptcy Act. (U.S.C. §714), and in a Chapter X, the reorganization court could place its trustee in possession of the property and restrain further proceedings to foreclose (§ 148, § 256 and § 257 of the Bankruptcy Act [11 U.S.C. § 548, § 656 and § 657]).

It is again submitted that *any* extra-judicial, post-bankruptcy sale, without the permission of the bankruptcy court, is voidable, and will be voided on a showing of either (1) an equity in the property; (2) fraud; (3) other inequitable conduct; and, (4) *a fortiori,* if any combination of such factors are present.

Since, as we submit, the extra-judicial sale involved herein is voidable even as against the debtor, now bankrupt, it is certainly voidable as against Appellant, and the creditors, who were not parties to the proceeding out of which the order dissolving the restraining order, was entered.

It is again appropriate to note that the pre-bankruptcy, state court action involved herein was *not* a foreclosure proceeding; hence the "exception" to the rule, heretofore noted, is totally inapplicable here, even assuming, solely *arguendo*, that this case was a so-called "straight bankruptcy". In this connection, it should

be further noted that although the receiver appointed in *Emil v. Hanley,* 318 U.S. 515, was to collect rents, as noted at page 11 of Country Life's Brief, nevertheless, the action there involved *was a judicial foreclosure proceeding.*

Actually, the facts of this case, involving a non-foreclosure action, constitute a "hybrid" situation, the more "typical", and "harder" case being the situation in which the secured creditor commences a pre-bankruptcy foreclosure suit and, at the same time, initiates steps preliminary to sale under the power of sale, his actual intent being to utilize the latter method of foreclosure. By thus proceeding, secured creditors can urge the pendency of the state court foreclosure action as depriving the bankruptcy court of jurisdiction, and proceed to sell extra-judicially, thereby depriving the trustee, and creditors, of right to redeem the property within one year, where, as here, the property is sold for less than the total judgment (*i.e.,* the gross sum owing under the Deed of Trust), C.C.P. § 725a.

Ironically, in a Chapter XI proceeding involving precisely such facts, Counsel for Country Life argued most eloquently that the bankruptcy court may restrain such foreclosure proceedings, and in so doing, advanced arguments, and a philosophy, in close harmony with Appellant's position. Thus, in their brief filed in the Central District of California, in the Matters of Kirk Gillett, Adrian Gillett and Kate Gillett, No's. 208,053-EC, 208,054-EC and 208,055-EC, respectively, Counsel for Country Life argued as follows at pages 6, *et seq.:*

> "Petitioner (the secured creditor) was proceeding alternatively to foreclose its deed of trust when these Chapter XI proceedings were filed on March

31, 1966. Petitioner's Superior Court action for judicial foreclosure was commenced on December 30, 1965. Concurrently therewith and independently therefrom, Petitioner pursued its power of sale foreclosure. In point of fact, foreclosure under Petitioner's deed of trust via the power of sale method was scheduled for April 1, 1966, the day following the inception of these Chapter XI proceedings.

"*While Petitioner makes much of the sanctity of its pre-bankruptcy State Court foreclosure proceeding, the reality is that it was preparing to realize upon its security by the non-judicial method. The safeguards present in a judicial foreclosure,* such as court supervision and the ability of a bankruptcy trustee to intervene, *Straton v. New,* 238 U.S. 318, which might prompt the Bankruptcy Court *in straight bankruptcy proceedings* to decline injunctive relief, *are most assuredly not present in the informal power of sale foreclosure.*

"The cases of *Straton v. New* supra, and *Emil v. Hanley,* 318 U.S. 515, . . . *are cases arising in straight bankruptcy,* where, as will be subsequently indicated, the power to enjoin is substantially less than in Chapter XI. If, as Petitioner urges, the Referee, in straight bankruptcy proceeding. . . . could not restrain its judicial foreclosure, *it does not follow therefrom that the Referee would also lack the jurisdiction in such bankruptcy proceeding to enjoin Petitioner's power of sale foreclosure, particularly where as here the judicial proceeding is not the true vehicle of foreclosure.*

"As Petitioner indicates in its Memorandum, it is the law in this State that foreclosure by the

twin methods of the judicial proceeding and the power of sale may be pursued concurrently until the event of foreclosure in one of the two permissible ways occurs. That being the case, *if Petitioner's concept of the law is correct, a secured creditor, by the simple device of instituting a specious judicial foreclosure proceeding and thereafter actively pursuing power of sale, could render the Bankruptcy Court helpless to safeguard the equity in the foreclosed property for the benefit of creditors. Logic cries out against such a result. . . .*

"In addition to the expanded jurisdiction conferred upon the Bankruptcy Court by Section 314 to restrain the enforcement of liens in Chapter XI proceedings, a further extension of the 'actual or constructive possession' test of straight bankruptcy is found in Section 311 of the Bankruptcy Act *which confers summary jurisdiction in the Chapter XI Court over property owned by the debtor irrespective of where located at the date of the filing of the Chapter XI proceedings.*

" 'With some exceptions, where a third party in an ordinary bankruptcy proceeding under Chapters I to VII has possession of the property involved and asserts a substantial adverse claim thereto, the Bankruptcy Court does not require (sic) summary jurisdiction over a controversy with respect to that property, even though ownership of the property is in the bankrupt. *As a result of § 311, however, the court in a proceeding under Chapter XI has summary jurisdiction over a controversy in that situation'.* 8 Collier on Bankruptcy, 14th Ed., pp. 177-179." (Emphasis Added).

Clearly, the whole tenor of the foregoing arguments is in marked contrast to, if not in total conflict with, the arguments advanced by Counsel for Country Life herein.

Since the Order of January 14, 1966, did not even purport to grant leave to foreclose, and since the Order of March 3, 1966, is patently void as against Appellant, who was not a party thereto, and had neither notice nor opportunity to be heard, and since the latter Order is additionally improper because it is supported by neither findings nor any evidence whatsoever, Appellee's argument that the property was voluntarily "delivered" to Country Life is clearly without merit.

Had there been entered proper findings, conclusions and an Order, expressly granting leave to foreclose, following a trial on the merits, the findings being supported by the evidence, and had Appellant been properly made a party thereto, given both notice and an opportunity to be heard, Appellee's "voluntary delivery" argument might have some merit, at least after the order became final; however, in light of the actual facts of this case, it is submitted that such theory is clearly inapplicable.

A further not inconsequential defect in the orders of January 14, 1966, and March 3, 1966, not heretofore mentioned, is the fact that both orders were entered in unusual, if not unseemly, haste, and both were likewise entered without any compliance with Local Rule 7a, of the District Court, which prescribes the form and manner for the entry of "Orders, Judgments, Findings and Conclusions of Law." In short, secrecy and haste appear to be a characteristic of both said orders.

II.

Appellees Ignore the Distinction Between Jurisdiction to Oust the State Court Receiver, and Jurisdiction to Restrain a Post-Bankruptcy, Extra-Judicial Sale, or to Avoid Such a Sale Conducted Without the Court's Permission.

Entirely aside from very serious questions as to the legitimacy of the State Court "receivership", which we again submit was and is utterly spurious on its face, nevertheless, even assuming, solely for argumentative purposes, that the state court receivership was valid, and that the bankruptcy court, accordingly, lacked jurisdiction to oust the state court receiver, and place its own receiver in possession of the debtor's real property, it by no means follows therefrom that the bankruptcy court would lack jurisdiction, even in a "straight bankruptcy", to restrain an extra-judicial, post-bankruptcy sale, or to avoid such a sale conducted without its permission. Thus, whether by accident or design, Appellees have confused the issue of jurisdiction by ignoring this vital distinction, and have thereby apparently persuaded the lower courts to accept the *non sequitur* that if the court lacked jurisdiction to supplant the state court receiver, the court likewise lacked jurisdiction to either restrain or avoid an extra-judicial, post-bankruptcy sale, a conclusion which we submit is patently erroneous.

It is notable that in their brief in the *Gillett* matters, a portion of which is quoted *supra*, Counsel for Country Life expressly recognized that even if the bankruptcy court could not, in a "straight bankruptcy" proceeding, restrain a judicial foreclosure sale, "it does not follow therefrom that the Referee would also lack the jurisdiction in such bankruptcy proceeding to enjoin

Petitioner's power of sale foreclosure, particularly where as here the judicial proceeding is not the true vehicle of foreclosure." This should follow *a fortiori* where, as here, the state court action is *not* a "foreclosure proceeding", since such state court action is obviously, and, necessarily, not the "true vehicle of foreclosure."

Thus, even assuming that the court lacked jurisdiction to supplant the state court receiver with its own (a proposition which Appellant disputes in view of the fictitious, if not fraudulent, nature of the state court "receivership"), it is submitted that even in a so-called "straight bankruptcy", the court would have ample jurisdiction to restrain a post-bankruptcy, extra-judicial sale, or to avoid such a sale conducted without its permission. (5A Remington on Bankruptcy, § 2374, pp. 119, 120; 8 Collier on Bankruptcy, Para. 3.22, p. 264, footnote No. 10; *Re Hasie, supra,* 206 Fed. 789; *Lockhart v. Garden City Bank & Trust Co., supra,* 116 F. 2d 658).

III.

From Its Inception on January 4, 1966, to March 2, 1966, This Was at All Times, Either a Chapter XI or a Chapter X Proceeding.

It is actually unnecessary to belabor this issue, since even in a "straight bankruptcy" proceeding, the bankruptcy court has jurisdiction to restrain a post-bankruptcy, non-judicial sale, or to avoid any such made without the court's permission; however, an error in Appellant's opening brief should be called to the court's attention; thus, at page 12, it is stated that:

> "*Following* the hearing of January 13, 1966, a Chapter X Petition was filed by the debtor and a

new restraining order was procured restraining First American from delivering its deed to Country Life." (Emphasis Added).

In fact, the Chapter X Petition was filed by the then debtor's counsel *before* said hearing, and at the same time he filed the debtor's mislabeled schedules. See, *e.g.,* the transcript of March 3, 1966, containing, *inter alia,* the following statements by Counsel for Country Life:

(1) At page 9, lines 2 to 17, inclusive:

"On that day [i.e., January 13, 1966] Mr. Mathes was not present at 10:00 o'clock; but when he appeared at 10:30 or some time thereafter, *and when he appeared the matter had become moot because a Chapter X proceeding had been filed that morning* . . . Actually Judge Hall, before whom the Chapter X proceeding was pending, had not approved the petition by the time I made a motion not to approve it, so there never was a formal approval of the petition." (Emphasis Added);

(2) At page 10, line 26, to page 11, line 6, inclusive:

"A document was filed, signed by Mr. Mathes on behalf of the debtor, saying the answering party withdrew its proceedings for reorganizing the corporation, which document entitled 'Chapter X', and on March 2, 1966 Judge Hall so ordered, *so we no longer have a Chapter X proceeding.*" (Emphasis Added).

The mere fact that the Chapter X Petition was never approved, does not alter the fact that such proceeding was pending at all times between January 13, 1966, and March 2, 1966, the date on which it was dis-

missed. Of course, the jurisdiction of a reorganization court is far more pervasive even than that of the bankruptcy court in a Chapter XI proceeding, for the reasons, *inter alia,* that a Chapter X reorganization may even deal with, or alter or modify, secured claims (6 Collier on Bankruptcy, 14th Ed., Para. 3.05, pp. 441, 442), and the reorganization court has jurisdiction not only of property in the debtor's actual or constructive possession, *but also property of the debtor in the hands of a lienholder.* (*Warder v. Brady* (4th Cir., 1940), 115 F. 2d 89. See also: *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.* (1935), 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110; *Grand Boulevard Investment Co. v. Straus* (8th Cir., 1935), 78 F. 2d 180; *Matter of Moulding-Brownell Corp.* (7th Cir., 1939), 101 F. 2d 664; *Matter of Prudence Bonds Corp.* (2nd Cir., 1935), 75 F. 2d 292).

Under §111 of the Bankruptcy Act (11 U.S.C. 511) the reorganization court has "exclusive jurisdiction of the debtor and its property, wherever located."

Since this proceeding was quite clearly a Chapter XI or X proceeding at all times from January 4, 1966 through March 2, 1966, no useful purpose would be served by further consideration of Appellees' untenable arguments that the case was a so-called "straight bankruptcy" during said period.

IV.

Appellees' Arguments Re "Discretionary Jurisdiction" Are Clearly Without Merit.

As set forth in Appellant's Opening Brief, pages 34 to 40, inclusive, the facts of this case clearly require the bankruptcy court's exercise of its exclusive jurisdiction, and, for the reasons, and on strength of the authorities cited, preclude any alleged "discretion" to decline to exercise such exclusive jurisdiction. It is submitted that the decisions in *Matter of Chicago & Northwestern Ry. Co.* (7th Cir., 1942), 127 F. 2d 1001, cert. den., 317 U.S. 659, and in *Matter of J. Rosen & Sons, Inc.* (3rd Cir., 1942), 130 F. 2d 81, are directly in point and are also decisive, and, further, that the "exception" enunciated in *Thompson v. Magnolia Petroleum Co.* (1940), 309 U.S. 478, has no rational application to the facts herein.

Ignoring that the vital issue of equity in the bankrupt's real property is irrelevant under state law (and, indeed, even suggesting, in a footnote on page 20, that such issue "possibly has relevance", without any citation of authority under California law) Country Life, at page 21, cited certain alleged authorities, but without demonstrating in any manner, their applicability to the facts of this case. Included among the authorities so cited by Country Life is this court's opinion in *Matter of Terrace Lawn Memorial Gardens* (9th Cir., 1958), 256 F. 2d 398. Even the most cursory reading of this decision reveals it to be readily distinguishable from the facts involved herein. Thus, not only did the questions in issue relate solely to matters of the law of the State of Idaho, but the litigation had been commenced a number of months prior to the filing of

the reorganization proceeding, and, as a matter of fact, the state court action was "on the eve of trial when the reorganization petition was filed." (p. 402). At page 401, the court summarized the issues involved in the state court action as follows:

> "The questions presently before the state courts are (1) whether, in the transactions relating to the transfer of certain lands, the debtor corporation was charged usurious interest; and (2) whether Dharity, who claims to be President of the corporation and who filed the petition for reorganization, is a stockholder; *and another, which governs the second, (3) whether the pledge of stock of this Idaho corporation, the foreclosure thereof and transfer by the depositary to the nominee of Doty, would be recognized under the laws of Idaho.*" (Emphasis added).

As further noted by the court at page 402, prior pendancy of state litigation is a "strong factor" in favor of permitting the action to proceed in the state court, especially where the trial in the state court is imminent, and the issues involved relate solely to state law. In the instant case, in complete contrast, the primary issue, viz.: the presence or absence of equity, is not only peculiarly an issue under the bankruptcy law, but, as previously noted, is actually irrelevant under the law of California, and to remand Appellant to the State Court would manifestly deprive him of his strongest, and possibly, only position, to the irreparable damage to the bankrupt estate and the creditors thereof. In other words, in this case the issue of equity in the property *is not only primary, but dispositive*, rendering it totally unnecessary to even consider whether the sale of Janu-

ary 14, 1966, is possibly also voidable under the law of California, by reason of announcements made immediately before the sale.

In *Terrace Lawn*, *supra*, again, the *only* issue involved state law, and, as previously noted, not only had the State Court action been pending long prior to the Chapter X proceeding, but the matter was on the "eve of trial". Clearly, none of the factors involved in the *Terrace Lawn* decision are remotely analogous to the facts hereof. The other authorities cited by Country Life at page 21 of its brief, are equally far afield and equally distinguishable on their face. As an example, Country Life, at page 22 of its brief, cites *Suhl v. Bumb* (9th Cir., 1965), 348 F. 2d 869, as a "recent case in point", for the proposition that where the existence of jurisdiction is "doubtful", bankruptcy courts are well advised to remit the parties to another forum. Not only are the facts of the *Suhl* case totally dissimilar in relation to the facts herein, but the case involved so obvious an excess of the bankruptcy court's jurisdiction, that it is difficult to understand how the question of jurisdiction in *Suhl* can possibly be characterized as "doubtful".

V.

Courts of Bankruptcy Cannot Be Deprived of Jurisdiction Merely Because They Cannot Award Complete Relief to All Parties Who May Be Indirectly Affected by Their Orders.

At pages 22 and 23 of its brief, Country Life argues that the bankruptcy court probably lacks jurisdiction to award "complete relief" to all parties who may be affected, directly or indirectly, should the post-bankruptcy sale of January 14, 1966, be avoided. As an example,

said Appellee sugges s that in the event of avoidance, Country Life might possibly have a cause of action against the Trustee under its Deed of Trust, presumably for expressing honest doubts as to the propriety of the sale, in view of the pendency of the Trustor's Chapter XI proceeding.

That the argument is unsound and diversionary is evident from the facts: (1) that Country Life, significantly, does not expressly urge that the inability to award "complete relief" deprives the court of jurisdiction it otherwise has, and, instead, it merely "suggests" that "the Referee rightfully concluded that 'fairness' required the case to be heard by a court which could fully grant the appropriate relief and adjust all of the rights of the litigants"; and (2) no authority is cited for the theory advanced. (While the *Suhl* case is again cited, it does not remotely stand for the proposition suggested by Country Life).

Clearly, the mere fact that an order of a bankruptcy court may "trigger" tangential litigation in other courts by or against parties affected, does not deprive the court of jurisdiction, nor does it give rise to any "discretion" in the bankruptcy court to decline to exercise jurisdiction which it otherwise has. Were the rule otherwise, the result would go far, indeed, toward the total elimination of the effectiveness of courts of bankruptcy, since in a high percentage of instances, orders of courts of bankruptcy do, in fact, lead to litigation by and between parties over whom the court lacks jurisdiction. Thus, for example, whenever the bankruptcy court invalidates a security interest in the real or personal property of a bankrupt, the secured creditors may, in most instances, have, or assert, a cause of action in a

State Court against an attorney, escrow holder, real estate broker, etc., for alleged malpractice or negligence based upon the acts or omissions which prompted the invalidation of the security interest. While the bankruptcy court in the overwhelming majority of such cases, lacks jurisdiction over such third parties, this fact has never been suggested, much less held, to deprive the court of its jurisdiction to adjudicate the validity of liens asserted on property in the court's actual or constructive possession, nor to give rise to any alleged "discretion" to refuse to exercise its exclusive jurisdiction.

VI.

Appellees' Venue Argument Is Wholly Lacking in Merit.

§ 2(a) (1), (11 U.S.C. § 11a) confers upon courts of bankruptcy jurisdiction to:

> "(1) Adjudge persons bankrupt who have had their principal place of business, resided *or* had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction. . . ." (Emphasis added).

As noted in 1 Remington on Bankruptcy, § 44, p. 87:

> "This statute [*i.e.*, § 2(a) (1)] is disjunctive. It is not necessary that the debtor have his residence, domicile, *and* principal place of business in the district, or that he have any two of them within the district, in order to give a particular court jurisdiction." (Emphasis, the Editors').

Contrary to Country Life's gratuitous observation that the bankrupt's representation, that its principal place of business is in Beverly Hills, California, is

"questionable", because its sole business involved the hospital in San Mateo County, it has long been recognized that a corporation's "principal place of business" may be its home office, rather than the locale of its actual operating facility. Thus, in 1 Remington on Bankruptcy, § 47, the following appears at page 93:

> "The 'home office' may well be considered the principal place of business, however, where it is the principal and controlling center of operations, ***notwithstanding production or distribution facilities, such as mines or factories, are located elsewhere.***" (Emphasis Added).

Furthermore, the provisions of § 2(a) (1) relate "to venue rather than jurisdiction". (*In re Eatherton,* [8th Cir., 1959], 271 F. 2d 199), and, in any event, the matter is not subject to a belated, or collateral, attack. (1 Remington on Bankruptcy, § 43, p. 86; *Fairbanks v. Wills,* 240 U.S. 642, 60 L. Ed. 841, 36 S. Ct. 466; *Hamilton Gas Co. v. Watters* [4th Cir., 1935], 79 F. 2d 438).

Country Life's unfounded assertion that there is no "legitimate creditor interest", totally ignores the provisions of § 57n of the Bankruptcy Act (11 U.S.C. § 93n) pursuant to which "late filed" claims may be allowed whenever a surplus exists over the aggregate of claims filed. Furthermore, not only is there no evidence whatever to support the insinuation that the sole claim thus far filed is of "questionable validity", but the merits of that claim have never been an issue in this case.

Perhaps even more pernicious is the premise of Country Life's argument in this respect, viz.: that an injustice may be allowed to stand if only a limited num-

ber of persons have been damaged thereby, a "theory" which is obviously irreconcilable with our principles of jurisprudence, and, indeed, any system of justice worthy of the name.

VII.

Appellees Have Utterly Failed to Answer the Serious Question of Due Process of Law Involved Herein.

Probably the most fundamental issue involved is the question whether the creditors of a debtor or bankrupt estate can be deprived of a valuable equity in property by reason of an order, or orders, entered in a proceedings to which their legal representative, viz: the Receiver or Trustee in Bankruptcy, was not made a party, and had neither notice nor opportunity to be heard. To this basic question, which we submit virtually answers itself, Appellees' only real response is the inane obervation, at page 20 of Country Life's brief, that "the receiver *chose* not to intervene". (Emphasis Added). It is respectfully submitted that virtually any layman would recognize this as no answer at all.

Conclusion.

It is again respectfully urged that the several orders entered herein by the Referee and District Court be reversed, and that the real property in question be adjudged to be an asset of the bankrupt estate, subject to the legitimate liens of record as of the inception of the proceeding on January 4, 1966.

Respectfully submitted,

JOSEPH S. POTTS,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. POTTS

Nos. 21958 and 21958A

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

GILBERT J. SHEFFELS AND ELEANOR SHEFFELS
Husband and Wife, *Plaintiffs-Appellants*

v.

UNITED STATES OF AMERICA, *Defendant*

MARJORIE HEITMAN, *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA, *Defendant*

On Appeals from the Judgments of the United States District Court for the Eastern District of Washington

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BRIEF FOR THE APPELLEE

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UNITED STATES OF AMERICA, *Defendant*

On Appeals from the Judgments of the United States District Court for the Eastern District of Washington

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether travel expenses incurred by the taxpayers in connection with tours of the Orient sponsored by the Spokane Chapter of the National People-to-People Movement were contributions made to the United States for exclusively public purposes so as to be deductible under Section 170 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The sole question on this appeal involves the correctness of the District Court's determination that neither Gilbert and Eleanor Shefffels nor Marjorie Heitman (hereinafter sometimes referred to as taxpayers) could deduct expenses incurred in a tour of the Orient under the auspices of the Spokane Chapter of the National People-to-People Movement as charitable contributions pursuant to Section 170 of the Internal Revenue Code of 1954. The District Court filed a joint opinion (I-R. 28-37, 64-73), reported at 264 F. Supp. 85, covering the cases of both the Sheffels and Dr. Heitman and the two appeals have been consolidated before this Court. Although in each instance federal income taxes for the taxable year 1961 are at issue, the two cases have differing procedural origins, as follows:

(1) Gilbert and Eleanor Sheffels initiated a suit for the recovery of taxes, not in issue here, on May 18, 1964. (I-R. 1.) On May 14, 1965, pursuant to Section 7422 (e) of the Internal Revenue Code of 1954 the United States filed a counterclaim for $1,307.80 of taxes and interest, which are the subject matter of this appeal. (I-R. 11.) The District Court entered a judgment in this amount against the Sheffels on May 21, 1968, to correct *nunc pro tunc* the erroneous judgment of May 5, 1967. (Supp. R. 94-95.) Within sixty days after entry of the judgment, on May 16, 1967, the Sheffels filed a notice of appeal. (I-R. 40.)

(2) Marjorie Heitman paid the $608.10 tax in dispute here on October 23, 1964. (I-R. 45.) She filed a claim for refund on November 6, 1964, which was rejected on May 26, 1965. (I-R. 43.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on June 8, 1965, she filed suit for recovery of the $608.10 plus interest. (I-R. 42-44.) The District Court dismissed her action on the merits on March 10, 1967 (I-R. 74), and on May 4, 1967, she filed a notice of appeal (I-R. 75).

This Court has jurisdiction by virtue of 28 U.S.C., Section 1291. None of the relevant facts are in dispute.

In 1956, President Eisenhower recommended the formation of some private vehicle to promote a face-to-face, international exchange of ideas between American citizens and their counterparts abroad as a means toward achieving understanding and peace in the world. (I-R. 29-30; II-R. 15.) From this idea there emerged approximately forty national People-to-People committees organized on the basis of profession, e.g., a music committee, a sports committee, a science committee, etc. (II-R. 184, 189.) Later, in 1960 and 1961, local regional organizations, referred to as chapters, were formed whose purpose was to provide facilities and hospitality for foreign visitors and to organize tours of foreign countries. (II-R. 189-190.) Although there was no direct tie-in between the committees and the chapters in their formation, the chapter and many of the committees subsequently became

affiliated with a formal national organization, located in Kansas City after its debut in 1961, People-to-People, Inc. (II-R. 184-185.)

At the early stage of development of the People-to People Program the United States Information Agency (U.S.I.A.) subsidized some of the committees, but by 1958 these ventures where wholly financed with private contributions. (II-R. 186-187.) In Rev. Rul. 57-38, 1957-1 Cum. Bull. 96, the Commissioner recognized that these contributions to committees for use in exclusively advancing the People-to-People Program are allowable deductions as charitable contributions so long as the particular committee became certified by the U.S.I.A. The U.S.I.A. has cooperated with the committees and national organization in rendering guidance and advice, but has not dealt with local chapters. (I-R. 34.) And although it has aided tour groups in securing meetings with their counterparts and in planning itineraries, it has neither sponsored any of the foreign tours nor arranged the necessary travel accommodations, the latter task being left to travel agencies. (I-R. 30.)

The Spokane Chapter, formed in 1960, was one of the first four regional groups organized and has been active from its inception. It sponsored two or three trips to the Orient in 1961 whose stated purpose was "to see the people and have the people see us." Prior to these trips the participants, including the taxpayers herein, would attend several meetings for briefing.

(I-R. 30.) After the participants returned from these trips additional meetings were held so that the touring members could share their experiences with the others. Talks were also arranged before local groups and, in the case of the Sheffels, color slides were presented to illustrate the talks. (I-R. 33-34.)

The Sheffels traveled to the Orient during 1961 in one of the People-to-People sponsored tours. As farmers, they visited farms and discussed agricultural techniques with people they would meet. Their tour took them to seven countries and caused them to spend as much as 95 percent of their time discussing farming in Korea and as little as 30 percent in Hong Kong. They also sent newsletters home for publication in a local newspaper. (I-R. 32-33.) The Sheffels did leave the tour to spend a week on their own in Indonesia, but do not seek a deduction for any expenses relating thereto. (II-R. 144.) They also rested for a day in Hawaii just prior to their return to the United States. (II-R. 157.)

Also in 1961, Marjorie Heitman, a medical doctor, joined a group of other doctors, nurses and teachers in a People-to-People sponsored tour of the Orient, covering ten to thirty days. She spent a great deal of her time in consultations with foreign counterparts, so much so that little time was left for personal shopping or sightseeing. (I-R. 33-34.)

On the evidence presented the District Court concluded that the expenses of these tours were not "for exclusively public purposes" and, accordingly, could not be deducted under Section 170(c) as a contribution to, or for the use of, the United States. (I-R. 34-36.)

SUMMARY OF ARGUMENT

Section 170 of the Internal Revenue Code of 1954 allows a charitable deduction for contributions "to or for the use of * * * the United States," but only if such contributions are made "for exclusively public purposes." The record in this case fully supports the District Court's determination that the Far-Eastern trips taken by the taxpayers, albeit under the sponsorship of the federally encouraged People-to-People Program, were not undertaken "exclusively" for public benefit, and thus do not fit within the statutory framework. Such determination should not be overturned by this Court unless found to be clearly erroneous.

In analogous cases involving claimed tax exemptions of corporations organized and operated "exclusively" for prescribed purposes, it is well established that the use of the qualifier "exclusively" precludes the presence of a single substantial nonprescribed purpose. Whereas, as the District Court found here, the travel expenses in question, far from having been incurred for "exclusively" public purposes, as required by the statute, were incurred primarily for the private benefit of the taxpayers.

The result below is also consistent with the published position of the Commissioner in dealing with similarly situated taxpayers. We submit that, although the publication postdates the tax year here in question, the action of the Commissioner pursuant to the express delegation in Section 170 in determining the extent to which private conduct "exclusively" benefits the United States should receive the similar, weighty consideration attributed to another of his line-drawing rulings in the most recent term of the Supreme Court.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT TRAVEL EXPENSES INCURRED BY TAXPAYERS IN CONNECTION WITH TOURS OF THE ORIENT SPONSORED BY THE SPOKANE CHAPTER OF THE NATIONAL PEOPLE-TO-PEOPLE MOVEMENT DID NOT EXCLUSIVELY BENEFIT THE UNITED STATES AND THUS WERE NOT PROPERLY DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS WITHIN SECTION 170 OF THE INTERNAL REVENUE CODE OF 1954.

Taxpayers traveled to several Far-Eastern countries during 1961 as members of tours sponsored by their local chapter of the People-to-People Movement. As appellants herein they seek to convince this Court that their transportation, food and lodging expenses in connection with these trips are deductible from their 1961 federal income tax as charitable contributions. They emphasize their diligence and goodwill in participating in such a worthwhile venture, together with a belief that the United States has materially benefited from their interchanges with counterparts abroad, as

reasons for the allowance of the claimed deductions.

In resisting taxpayers' claims, the Government wishes to make clear that it intends no discredit upon either the individual motives of the taxpayers or the general objective of the People-to-People Movement. We readily recognize that private citizens can do much in this area to promote Americanism around the world and thereby enhance the chances for genuine peace and understanding. There are, indeed, many such fields and endeavors possessing similar, commendable objectives, but that attribute, unfortunately for the taxpayers, is not the touchstone for deductibility. Rather, the proper inquiry in determining whether a person can reduce his federal tax bill is, as well stated in *Estate of Blaine* v. *Commissioner,* 22 T.C. 1195, 1212 (1954)—

> * * * neither whether the organization is worthy, nor whether it is engaged in desirable activities, but it is whether the particular matter under review is covered by the specific statutory provision relating to it. * * *

See also *Reed* v. *Commissioner,* 35 T.C. 199, 202 (1960); *ErSelcuk* v. *Commissioner,* 30 T.C. 962, 965 (1958); and *Cook* v. *Commissioner,* 30 B.T.A. 292, 295 (1934). We can thus proceed to a consideration of the applicable statutory provision and the legal tests asserted therein.

A. *The record fully supports the ultimate finding of the District Court that the taxpayers' travel expenses were notpayments "for exclusively public purposes"*

Section 170(a)(1) allows the deduction of a charitable contribution in the taxable year in which the payment is made; Section 170(c)(1) defines charitable contributions as made to, or for the use of, the United States "for exclusively public purposes."[1] According-

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[1]Internal Revenue Code of 1954:

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) *Allowance of Deduction.*—

(1) *General rule.*—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

* * *

(c) *Charitable Contribution Defined.* — For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(1) A State, a Territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

* * *

(26 U.S.C. 1964 ed., Sec. 170.)

ly, the single, narrow issue before this Court is whether taxpayers' expenditures on their respective tours of the Orient came within the above statutory limitation of those "exclusively" benefiting the United States.

On the evidence presented the District Court found that the expenses incurred by the taxpayers in connection with their respective tours of the Orient were not exclusively for public purposes, as required by the statute, and, consequently, could not be deducted. The court found that the expenses were for the personal use of the taxpayers as well as for the United States; and, even further, the court considered that the taxpayers were the primary beneficiaries of the expenses and the purposes of the Government were served only incidentally, thus clearly falling outside of the "exclusively" standard enunciated by Congress. (I-R. 35.) Such basic and ultimate findings by a trial court should not be set aside unless clearly erroneous, i.e., the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948); *Van Der Veen* v. *United States*, 349 F. 2d 583, 586, 587 (C. A. 9th, 1965); *Los Angeles Extension Co.* v. *United States*, 315 F. 2d 1 (C. A. 9th, 1963); Rule 52(a) of the Federal Rules of Civil Procedure. The record fully supports this ultimate factual finding, as follows:

1. Neither the foreign tours nor the activities of the local chapters were in any sense sponsored by an

agency of the United States. To be sure, the idea of a People-to-People Program was initially formulated by President Eienhower (he appointed some forty-odd chairmen of the national committees (II-R. 184)) and the Government through the U.S.I.A. gave some limited financial and administrative support to these committees to get them off the ground. But by 1958 (and certainly during the year 1961 involved here) its function was strictly liaison, similar for the most part to its relationship with business and service organizatons like the Rotary and Lions Clubs. (II-R. 187.) Indeed, the U.S.I.A. took specific exception to any claims that it sponsored the People-to-People tours. (I-R. 34.) And the Spokane Chapter itself, in the words of its chairman, Dr. Hunter, confirmed the private aspect of the organization (I-R. 31):

> The Spokane Chapter is engaged in acts of private initiative, using private money, for the purpose of increasing international understanding and friendship . . . The Spokane Chapter does not seek or desire any government sponsorship or funds and does not claim any sponsorship of any government agency. * * *

2. After considering the taxpayers' detailed testimony concerning their activities on the tours (Heitman, II-R. 61-85; Sheffels, II-R. 88-176) the District Court concluded that it could see "very little difference between the private trips made by the ordinary tourist and those made by taxpayers here" (I-R. 35). According to the uncontroverted testimony of Mr.

Arnold Hanson, a U.S.I.A. official familiar with the People-to-People tours from their beginning, Government officials abroad gave their People-to-People tour groups no more or less assistance than other private tour groups, and would not give away assistance unless requested to do so. (II-R. 177-181.) Although there were, as between the taxpayers here, variances in the percentage of time each spent in furtherance of the People-to-People aspect of the trips (e.g., the *Sheffels* spent as little as 30 percent of their time in Hong Kong on farm matters, while Dr. Heitman spent most of her time in hospitals) and thus there were inevitably variances in the amount of benefit which the United States may have received from any one tour participant, the court was unable to find that either of the taxpayers benefited only incidentally from their experiences. Indeed, far from primarily imparting benefits to others, the tour groups did as much, if not more, learning while on these trips. Gilbert Sheffels, for one, expressed disappointment on this score (II-R. 155), and his wife testified that "We naturally got a lot more because we were seeing their countryside" (II-R. 171). Probably most illustrative of the lack of any significant difference between these People-to-People tours and private trips of responsible citizens is Gilbert Sheffels' observation that his most successful imparting of knowledge and goodwill was during his side trip to

Indonesia, when he concededly was traveling as a private tourist. (I-R. 155.)

There is, therefore, no sufficient basis in the record for setting aside the considered judgment of the District Court short of the clearly improper one of allowing a deduction based on a person's sense of the noble mission to promote understanding among the peoples of the world. If such were the law, travelers generally who might show such a purpose would be permitted a taxpayer-financed tour of foreign lands.

B. *Such a result is in accord with the recognized standard that "exclusively" precludes the presence of a single substantial noncharitable purpose.*

Taxpayers contend (Br. 12) that the "exclusively" requirement of Section 170(c) should not be strictly followed. Since no contribution could be made to the United States without the donor's retaining some benefit and since it is not known what Congress meant by the term "exclusively," taxpayers urge the reasonableness of concluding that Congress did not intend to preclude the deductibility of such obviously beneficial conduct as their People-to-People tours of foreign countries.

However laudatory may have been taxpayers' purposes in undertaking these foreign trips, they cannot be given a deduction which the statute does not allow. They would read Section 170(c) (1) as though "ex-

clusively" had been omitted and state the applicable standard as one that would permit charitable deductions so long as some significant benefit inures to the United States. But merely because some incidental benefit may accrue to an individual from his participation as the donor of a charitable contribution—as, e.g., when the Mellons gave the National Art Gallery to the nation—we contend that this is not license to remove completely a Congressionally-imposed limitation on the deductibility of a charitable contribution to the United States. It is much more reasonable to assume that Congress meant to exclude from Section 170 those contributions with significant substantial private benefit than to conclude that the word "exclusively" was mere surplusage and without meaning. Indeed, this is precisely how the Supreme Court has interpreted the usage of the word "exclusively" in a closely analogous context.

In *Better Business Bureau v. United States,* 326 U.S. 279 (1945), the Court, in interpreting Section 811(b)(8) of the Social Security Act, c. 531, 49 Stat. 620 (which provided an exemption from social security tax for corporations "organized and operated exclusively for * * * scientific * * * or educational purposes"), stated that "exclusively" plainly meant without the presence of a single noneducational purpose substantial in nature, regardless of the number or

importance of the purely educational puposes.[2] The Court met (*supra,* p. 283) the argument of counsel that a liberal construction should be applied to an act which exempts from taxation religious, charitable and educational institutions with the following response:

> Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored. Petitioner's contention, however, demands precisely that type of statutory treatment. Hence it cannot prevail.

Thus the recognized standard for charitable contributions—if any meaning at all is to be given the Congressional usage of the limiting word, "exclusively"—requires a disallowance of the deduction where

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[2]See also, *Scripture Press Foundation* v. *United States,* 285 F. 2d 800 (Ct. Cl., 1961), certiorari denied, 368 U.S. 985 (1962;) *Hammerstein* v. *Kelley,* 235 F. Supp. 60 (E.D. Mo., 1964), affirmed, 349 F. 2d 928 (C. A. 8th, 1965); *Krohn* v. *United States,* 246 F. Supp, 341 (Colo., 1965), which emphasize that where the noncharitable aspect of the endeavor is more than merely incidental, the substantiality of the charitable aspect cannot alone satisfy the "exclusively" standard.

both the individual and the United States receive a substantial benefit by reason of the contribution. Such a dual benefit simply does not satisfy the statute.[9]

C. *Such a result is also in accord with the Commissioner's outstanding rulings with respect to the People-to-People Program, rulings which have been issued pursuant to the specific statutory delegation contained in Section* 170(a)(1)

Section 170(a)(1) provides that a charitable contribution shall be deductible "only if verified under regulations prescribed by the Secretary or his delegate." Pursuant to this grant of authority, the Commissioner has issued countless rulings on the charitable status of various activities and organizations, including some covering the People-to-People Program.

In Rev. Rul. 57-38, 1957-1 Cum. Bull. 96, the Commissioner considered the deductibility of cash contributions made to the committees organized to carry out the People-to-People Program and actual expenses incurred by members of these committees in the course

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[9]For this reason, it is not possible to allocate the Section 170 deduction between the charitable and noncharitable aspects of the endeavor as we are able to do with business trips which are partly for pleasure under Section 162(a). Section 162(a) has no similar "exclusively" standard.

of rendering volunteer services to them. Because the People-to-People Program was one in which the Government was keenly interested, he concluded that both the cash contributions to these committees and the out-of-pocket expenses of their members exclusively in furtherance of the People-to-People Program were contributions for the use of the United States and, accordingly, deductible under Section 170. As a check, however, the Commissioner required that the committees seeking tax deductions for its members obtain annual certification from the U.S.I.A. to verify their activities as exclusively in furtherance of the People-to-People Program.

This ruling, issued in 1957, when there were no local chapters of the type involved in the instant case, referred only to the national committees organized along professional lines, which, as we have seen, had an

intimate connection with the Federal Government (President Eisenhower appointed the committee heads[9] and the U.S.I.A. was at the time partially subsidizing them). Moreover, the record does not show that these committees were then undertaking the planning and recruitment for overseas tours in which local chapters were later to be primarily involved. Thus, the nature of the services performed and the expenses incurred by persons serving on these committees, involving purely domestic work, was unlikely to contain the kind of individual benefit inherent in the overseas trips.

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[9]One aspect of the planning for these trips of concern to the Government is the somewhat informal basis upon which the "People-to-People" label can be placed upon a tour. The policy appears to be that a tour aspirant does not usually become a chapter member until he decides to take the tour, thus bringing into question the motivation for joining the chapter, i.e., whether the primary objective might have been the tax-deductible aspect of the trip rather than its patriotic objective. Indeed, the record even shows that on occasions nonmembers come in and ask to lead tours. (II-R. 35.)

In Rev. Rul. 64-216, 1964-2 Cum. Bull. 63, the Commissioner had occasion to consider the deductibility of foreign tours under the auspices of the People-to-People Program. While admitting that such tours may sometimes be consistent with the objectives of the program, the ruling stated that they are not payments made exclusively for the use of the United States and were not of the type of deductible expense contemplated by Rev. Rul. 57-38, *supra*. The ruling thus precludes tour participants from deducting any expenditures in connection with the tours.

This ruling, though published subsequent to the year involved here, is a proper administrative resolution of this problem by the Commissioner pursuant to his rule-making power. Taking the two rulings together, he has engaged in the kind of administrative line-drawing approved most recently by the Supreme

Court (*United States* v. *Correll,* 389 U.S. 299 (1967)) and which if although arbitrary, is reasonable, ought to be approved by this Court. Thus, in this respect the content of the 1964 ruling is relevant to this Court's consideration because an adverse ruling in either of the two cases would undermine the Commissioner's carefully drawn line.[5]

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[5]The lengthy record testimony in the instant case should be enough to demonstrate the wisdom and necessity of drawing such a line. There is, of course, no reason to believe that the Sheffels and Dr. Heitman have been anything but completely candid in their testimony with respect to the context of their trips. The Commissioner, however, simply does not have the resources to check on the stories of the countless other participants of the People-to-People tours who might not be so candid to ascertain the relative degree of personal benefit inuring to them. It is, therefore, apparent that the Commissioner must seek a solution based on the mainsprings of human conduct, the result of which relegates foreign trips to the category of a highly desirable personal venture and thus not deductible as charitable contributions.

CONCLUSION

For the above stated reasons, the decision of the District Court in each case should be affirmed.

Respectfully submitted,

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No. 21968

United States
Court of Appeals
for the Ninth Circuit

MICHAEL CLEMENT SWART,
Aka Michael Hastings, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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RULES INVOLVED

Rule 26, *Federal Rules of Criminal Procedure;*

In all trials the testimony of witnesses shall be taken act of Congress or by these rules. The admissibility of orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congres or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 52, *Federal Rules of Criminal Procedure; Harmless Error*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

No. 21968

United States
Court of Appeals
for the Ninth Circuit

MICHAEL CLEMENT SWART,
Aka Michael Hastings, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE[1]

At approximately 3:00 P.M., on Friday, October 22, 1965, The St. Johns Branch of the Security National Bank of Oregon in Portland was robbed of $7,174.00 by a lone gunman (D. Br. 2; TR. 13, 15, 32-34, 46-47, 77-79).

[1] As used hereafter, "TR." denotes transcript of proceedings, "Govt. Ex." Government's exhibits at trial, and "D. Br." defendant's brief on appeal.

At the time of the robbery, the bank's deposits were insured by the Federal Deposit Insurance Corporation (D. Br. 2; TR. 11-12).

Two bank employees, teller Mrs. Judith Kay Lovall, and Mrs. Beverly Ridgeway, a bookkeeper, positively and unequivocally identified the defendant as the robber although subject to extensive cross-examination (TR. 32-34, 35-40, 77-81, 83) and although neither had seen his picture during the investigation of the case (TR. 37, 85).

Mrs. Lovall's identification was, in part, predicated on the fact that the defendant had previously entered the bank for a brief time between 12:00 and 1:00 P.M. on the day of the robbery (TR. 33-34, 36), a fact corroborated by Mr. Victor Nelson, the bank manager (TR. 12-13). She also noted in response to a question on cross-examination with respect to her identification: ". . . it's hard to forget a face once you have seen someone that has frightened you half to death."

Two other witnesses, Victor Nelson, the bank manager, and Gary Brush, a former teller, described the defendant as similar in appearance to the man who robbed the bank (TR. 20-21, 47) notwithstanding that at the time of the robbery the defendant wore a mustache and had long bushy hair, while at the trial

he was clean shaven and had a crew cut (TR. 23, 38, 39, 47).

In addition to a gun, the defendant also carried two shopping bags, one of which fell to the floor during the robbery where it was recovered by Mr. Nelson and subsequently turned over to the FBI (TR. 13-14, 25, 32-33, Govt. Ex. 3). This bag bore the trade label of a Cornet Store (Govt. Ex. 3).

As the defendant exited the bank, Mr. Brush followed him and recorded what he believed to be the license number of a car, described as a 1955 or 1956 blue over white Lincoln or Mercury, and used by the defendant to make his escape (TR. 48-50, 73). Aside from the letter "L", Mr. Brush had no independent recollection of the number recorded nor could his memory be refreshed from an examination of Government's Exhibit 11, described as pictures of a car identical to the escape vehicle (TR. 51-52; Govt. Ex. 11). He testified that after he turned the recording of the license number over to a person he believed to be an FBI agent, he never saw it again (D. Br. 2; TR. 53-54).

Special Agent Thomas E. Sheil, FBI, conducted an interview with Mr. Brush some twenty-five to forty-five minutes after the robbery (TR. 56, 58-59, 64), during which time Mr. Brush orally furnished the

license number of the escape vehicle (TR. 57-59). Agent Sheil's original notes of the interview were reduced to an official report which accurately reflected the number supplied by Mr. Brush (TR. 59). The memorandum made by Mr. Brush of the license number was apparently never given to any member of the FBI (TR. 57).

Over objection, Agent Sheil was permitted to testify the license number received from Mr. Brush was Oregon BL-4063 (TR. 64-65). Cross-examination by defense counsel again elicited the same number previously objected to on direct (TR. 67). Prior to the reception of such evidence, the Court admonished the jury that ". . . evidence of this type is so far removed or so many steps removed from the person who originally claimed to have noted the license plate, it is sometimes extremely unreliable. Whether or not this is or isn't will be ultimately for you to weigh and only you, but you should look at it with some degree of caution." (TR. 64).

Information identical to that obtained by Agent Sheil was similarly obtained from Mr. Brush by Detective Prescott Hutchens of the Portland Police Department. This information was orally conveyed some thirty minutes after the robbery and was incorporated into Detective Hutchen's investigative notes, which in turn became part of an official police report.

Over objection, Detective Hutchens was permitted to testify to the number obtained from Mr. Brush (D. Br. 3; TR. 71-73).

A license number identical to that obtained by Mr. Brush was also recorded by Miss Phillis B. Leach. On the afternoon of the robbery, Miss Leach was sitting in a car in front of the bank, when she observed a man carrying a shopping bag emerge from the bank, run to a car parked near by, and drive away (TR. 90-91). Although she recorded the number contemporaneously with the foregoing incident, she no longer had the recording at the time of trial and had no idea of its location or contents aside from the letters "BL" (TR. 92).

At approximately 6:00 P.M. the evening of October 22, 1965, Special Agent Leonard Frank, FBI, interviewed Miss Leach at her residence at which time she orally furnished the license number she had recorded earlier that day (TR. 97). This information subsequently became part of an official report of the FBI (TR. 98). Agent Frank was then permitted over objection to testify the license number furnished by Miss Leach was Oregon BL-4063 (TR. 99).

With respect to the original notation by Miss Leach, the FBI again had no information about this document (TR. 98).

At approximately 4:20 A.M., on October 23, 1965, a blue over white Lincoln bearing Oregon License plates 8L 4063 was recovered from the City Center Parking Service lot at S.W. 2nd and Washington Street in Portland. This vehicle had been checked in at the parking lot on October 22nd at 3:26 P.M. by an unknown man who informed the attendant he would return for it later that same night. (TR. 152, 158-159, 162-164; Govt. Ex. 11). The car had been reported stolen from the K & M Parking Lot on West Park in Portland between 8:00 p.m. on October 20, and 1:00 p.m., October 21, 1965, by Mrs. Minnie Albert (TR. 152-154; Govt. Ex. 11). It was subsequently determined that the drive from the St. Johns Branch of the Security Bank to the City Center Parking Service takes approximately fifteen minutes (TR. 124-127).

This car was processed for latent fingerprints by Special Agent James Benbrook, FBI (TR. 26-27, 164; Govt. Ex. 11). Certain rubber lifts of latent impressions obtained from the vehicle (TR. 27; Govt. Ex. 15) were compared with the known prints of the defendant (TR. 74-75; Govt. Ex. 16) and were found to be identical (TR. 186-188; Govt. Ex. 15, 16, 17(A)).

At approximately 9:00 P.M., on October 20, 1965, the defendant, under the name "Mike Hastings" regis-

tered at the Admiral Hotel in Portland, which is located diagonally across from the K & M Parking Lot (TR. 109, 111-112). Although his rent was paid through the 23rd, he checked out "in a hurry" on the evening of the 22nd without asking for or receiving a refund (TR. 111). He was identified by the hotel manager as having signed the name "Mike Hastings" on two room registration cards (TR. 108-111; Govt. Ex. 6, 7).

After leaving the Admiral, the defendant, still using the name "Mike Hastings," registered at the Danmore Hotel, 1217 S.W. Morrison, Portland, on the evening of October 22nd, checking out on October 24, 1965 (TR. 131-132; Govt. Ex. 8, 9).

After comparing the signature "Mike Hastings" appearing on the registration cards from the Admiral and Danmore Hotels (Govt. Exs. 6, 7, 9) with a letter admittedly written by the defendant (Govt. Ex. 10 and stipulation), Carl Lilja, the Government's Washington-based document examiner, concluded that the "Mike Hastings" signatures appearing on each of these three exhibits were authored by the same person who prepared Government's Exhibit 10 (TR. 173; Govt. Ex. 10-A, 10-B). Amplifying his answer on cross-examination, Mr. Lilja explained that based upon his reading, training and experience, there was nothing in the questioned or known writings to indi-

cate they could have been written by two different individuals (TR. 179).

On October 23rd, Special Agent Delbert Bielenberg, FBI, conducted a search of the first floor rest room of the Admiral Hotel finding, among other things, two brown shopping bags bearing the labels "Cornet Stores — ten cents," a business card from John Helmer's Clothing Store, bearing the name Ray Wheaton, and a cash register receipt from this same store (TR. 118-120; Govt. Ex. 4-A, 4-B, 5-A, 5-B).

Further investigation revealed that on October 22, 1965, Mrs. Doris Woolford, of the St. Johns Cornet Store, sold three shopping bags to an unknown man. These bags were identical in nature to Government's' Exhibit 3; the bag dropped by the defendant during the robbery (TR. 13-14, 102-103).

At approximately 6:30 P.M., on Friday, October 22nd, Mr. Ray Wheaton, a salesman for the John Helmer's Men's Store, 969 S. W. Broadway, Portland, sold the defendant $68.80 worth of clothing, including a sport coat, hat, sport shirt, and socks (TR. 138, 139, 141-142). During the course of the sale, the defendant told Mr. Wheaton he and his wife had won a sizeable quantity of money gambling in Las Vegas and of that sum he banked $1,000.00, gave his wife $500.00, and kept a portion of the remainder for

himself (TR. 139-140). Mr. Wheaton identified the cash register receipt (Govt. Ex. 5-B) found in the garbage can at the Admiral Hotel as the receipt from the foregoing transaction, and his business card (Govt. Ex. 5-A) also found in the Admiral Hotel rest room, as similar to the one he gave the defendant at the time of the sale (TR. 138-139, 141).

During the course of the trial, the Government produced twenty-six witnesses and offered some twenty exhibits, all of which were received with the exception of exhibit 13; the parking ticket from the City Center Parking Service found on Mrs. Albert's car at the time of recovery.

The trial commenced on April 11, 1967, and concluded on April 13, 1967. The jury returned a verdict of guilty and the defendant was committed to the custody of the Attorney General for a period of eighteen years with the stipulation that he was eligible for parole at the discretion of the Board of Parole.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING HIGHLY RELEVANT AND MATERIAL EVIDENCE WITH RESPECT TO THE LICENSE NUMBER OF A VEHICLE USED BY THE ROBBER TO ESCAPE FROM THE SCENE OF THE CRIME.

A. THE TESTIMONY OBJECTED TO WAS NOT HEARSAY BUT WAS ADMISSIBLE UNDER THE THEORY OF PAST RECOLLECTION RECORDED.

Defendant urges the admission of testimony by FBI Agents Sheil and Frank and Portland Police Detective Hutchins with respect to the license number of the escape vehicle which had been communicated to them by witnesses Brush and Leach respectively was error (D. Br. 2-4, 11; TR. 48-50, 56, 58-59, 64-65, 71-73, 90-92, 98-99). The contention is without merit.

Defendant's characterization of such evidence as hearsay is inaccurate. The testimony was clearly admissible under the theory of past recollection recorded; a doctrine normally considered an exception to the hearsay rule.

Defendant's delineation of this type of evidence with the cliched canard of "hearsay" overlooks the massive range of evidence admitted under various exceptions to hearsay rule. Evidence, technically hearsay, has frequently been admitted under one or

more of the following exceptions: testimony of a former hearing, admissions against interest, spontaneous declarations, reputation evidence, boundaries, pedigree, recitals in ancient documents, business and Government records, public documents, handwriting and fingerprint exemplars, dying declarations, res gestae, and records of past recollection recorded; the theory relied upon by the Government in the case at bar. See generally: *McCormick on Evidence* (1954 Edition), The Hearsay Rule and Its Exceptions, and *Wigmore on Evidence* (3rd Edition, 1940), Exceptions to the Hearsay Rule, Sections 1420-1426, 1751 *et seq;* Title 28, Sections 1731-1736, United States Code; Rule 44, Federal Rules of Civil Procedure; Rule 15, Federal Rules of Criminal Procedure. The foregoing list is by no means intended to be all inclusive.

Hearsay evidence is generally defined as out of court statements, written or oral, not under oath or subject to cross examination and offered to prove the truth of the matter asserted. See: *McCormick on Evidence* (1954 Edition), Section 225; *Wharton's Criminal Evidence* (12th Edition, 1954), Section 249; *Wigmore On Evidence* (3rd Edition, 1940), Section 1395. The use of this type of evidence is in sharp contrast to the application of the doctrine of past recollection recorded which necessarily requires testimony that the witness have (1) no independent recollection of the facts in question, (2) that he pre-

pared a document or memorandum at the time the events were "fairly fresh" in his memory, (3) that neither the memorandum or any other stimulus can refresh his recollection, and (4) that at the time it was prepared, the memorandum was an accurate and complete record of what transpired. Only when the foregoing criterion are satisfied is the memorandum, document, or writing admissible as a record of past recollection recorded. See *State v. Benson,* 58 Wash. 2d 490, 364 Pac. 2nd 220, 223 (1961); *United States v. Riccardi,* 174 F. 2d 883 (3rd Cir., 1949), *cert. den.* 337 U.S. 941; *McCormick on Evidence* (1954 Edition), Section 276-277; *Wigmore on Evidence* (3rd Edition, 1940), Section 734.

In the instant case each of the above requirements was satisfied prior to the admission of the testimony objected to. Both Mr. Brush and Miss Leach, each of whom recorded the license number of the vehicle used by the defendant to make his escape, testified at the trial they had no independent recollection of the number (D. Br. 2; TR. 50, 92). Although the memoranda prepared by each of these witnesses contemporaneously with the defendant's escape were apparently lost, misplaced or destroyed prior to trial, the license number was orally communicated by the witnesses to Agents of the FBI and a member of the Portland Police Department (D. Br. 2; TR. 49-50, 53-54, 57, 91-92). FBI Agent Thomas Sheil and

Detective Prescott Hutchins conducted separate interviews with Mr. Brush within twenty-five to forty-five minutes of the robbery at which time he orally furnished the license number (TR. 53, 56-57, 64, 70-72). Although Mr. Brush believed he turned his memorandum containing the number over to an FBI Agent, the Bureau files contained no evidence of this document (D. Br. 2; TR. 53, 57). During a similar interview conducted by Agent Frank with Miss Leach at her home some three hours after the robbery, she also informed him of the license number. Agent Frank testified a search of the FBI files showed no record of Miss Leach's original memorandum even though the record is devoid of any evidence suggesting it ever left her possession (TR. 92, 98). The notes taken during the foregoing interviews were subsequently incorporated in official reports of the respective agencies (TR. 57-59, 71-72, 98-99). Agent Sheil also testified his report accurately reflected the information conveyed to him by Mr. Brush (TR. 59).

As a condition precedent to permitting each of the interviewing officers to read the license number of the vehicle from their reports, the trial Court carefully admonished the jury that,

> ". . . ladies and gentlemen, evidence of this type is so far removed or so many steps removed from the person who originally claimed to have noted the license plate, it is sometimes

> extremely unreliable. Whether or not this is or isn't will be ultimately for you to weigh and only you, but you should look at it with some degree of caution." (D. Br. 2-4; TR. 64)

There seems little doubt that if the original memoranda prepared by witnesses Brush and Leach and reflecting the license number had been preserved, each would have been admissible at the trial under doctrine of past recollection recorded. Why then should a record of this same transaction be rendered inadmissible merely because it is the product of two individuals?

In discussing this precise question, Prof. Wigmore concludes that where one person makes an oral statement of a particular transaction which is then recorded by a second individual reception of the memorandum supported by their joint testimony is proper and "in perfect accord with legal principle . . ." The discretion of the trial Court should control the admission of this type of evidence and "no ruling of admission should ever be deemed error worth noticing on appeal." *Wigmore on Evidence* (3rd Edition, 1940), Section 751, 755. Prof. Edmund M. Morgan is similarly in accord with the foregoing.

> "The problem is slightly more complex where the memorandum is the joint product of two or more persons. Witness W has ob-

> served the facts and reported them to witness X, who has made a record of them. Each swears to the accuracy of his own performance. On their combined oaths the memorandum is as fully verified as it either had both observed and recorded. The cross-examiner's' task, however, is made somewhat harder by this division of testimony. *Yet so long as a memorandum is produced which would have been admissible if made by the observer himself, reasonably adequate criteria of value are at hand for court and jury, and the contents of the writing should be received.*" (Emphasis added.)

The Relation Between Hearsay and Preserved Memory, 40 *Harvard Law Review* 712, 720 (1927). To the same effect see also: *McCormick on Evidence* (1954 Edition), Section 279.

Although there is a paucity of cases on the subject, those Courts which have addressed themselves to the question have generally rejected the characterization of hearsay and admitted evidence analogous to that offered in the instant case. In *Rathburn v. Brancatella,* 93 N.J.L. 222, 107 A. 279, 281 (1919), a question was raised concerning the ownership of a car involved in a personal injury action. One witness to the accident shouted the license number to another who recorded it on an envelope. The second witness also orally furnished the number to a police officer within ten to fifteen minutes of the accident. This

witness later destroyed the envelope assuming it was no longer of value. During the trial, an agent of the Department of Motor Vehicles identified the license number thus transmitted as the number of a car registered to the defendant. In affirming the conviction, the appellate Court rejected the contention that the testimony of the recording witness and the police officer was hearsay holding that

> ". . . where a witness testified that he made a correct report of a matter to another, at a certain time, but does not remember the exact facts reported, the testimony of the person to whom the report was made is admissible to show the facts reported."

To the same effect: *Chalmers v. Anthony,* 8 N.J.M. 775; 151 A. 549 (1930). See also: *Shear v. Van Dyke,* 17 N.Y. S. Ct. Rep. 528, 10 HUN 528 (1877).

The cases relied upon by defendant (D. Br. 11, 12, 13) in support of his position are inapposite and do little to support his resolution of the matter. It is significant to note that in *Neusbaum v. State,* erroneously cited as *State v. Newcomb* and on which defendant places heavy reliance, both the observing and recording witnesses were not called thus depriving the defendant of his right of confrontation and cross examination and the jury of its right to consider their testimony in the aggregate. It should also be noted that although the reviewing Court found the offending

testimony to be hearsay, it refused to reverse on this ground since the record failed to demonstrate any prejudice to the defendant. See citations of authority on this point under part "B".

In the instant case both of the observing witnesses (Brush and Leach), together with the recording witnesses (Sheil, Frank and Hutchens) testified and were thus fully subject to the rigors of cross examination. Herein lies the basic distinction between the evidence proffered by the Government and that denominated as hearsay; the former is subject to the strictures of cross examination, confrontation and observation, while the latter is not. See *Wigmore on Evidence* (3rd Edition, 1940), Sections 1362, 1395. This also seems to be the reasoning, at least in part, behind the promulgation of Rule 503(b) of the *Model Code of Evidence* which permits the admission of a hearsay declaration ". . . if the judge finds that the declarant . . . is present and subject to cross examination."

Hopefully the concept of common sense embodied in Rule 26, Federal Rules of Criminal Procedure, will obtain. The rule provides in pertinent part that:

> "The admissibility of evidence . . . shall be governed . . . by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The exigencies of the particular fact situation presented by this case as well as those of other crimes of violence frequently dictate that two or more persons must combine to produce a single element of evidence. So long as the traditional safeguards set forth above surrounding the admission of evidence under the doctrine of past recollection recorded are satisfied, no jury should be deprived of considering its evidential value in deciding the cause.

B. ADMISSION OF HEARSAY EVIDENCE DOES NOT REQUIRE REVERSAL

Even assuming *arguendo* the evidence respecting the license number was hearsay, the error, if such existed, did not contrive to deprive defendant of a fair trial; the admission being harmless within the ambit of Rule 52(a), Federal Rules of Criminal Procedure.

It is well settled that the admission of hearsay testimony does not per se require reversal. In determining if the defendant was prejudiced as a result thereof, the Courts consider the strength of the Government's case independent of the hearsay. *U.S. v. Press*, 336 F.2d 1003, 1013, (2nd Cir., 1963); *cert. den.* 379 U.S. 965; *U.S. v. Watkins*, 369 F.2d 170, 172 (7th Cir., 1967); *U.S. v. Cianchetti, et al*, 315 F.2d 584, 590 (2nd Cir., 1963). See also *Delli Paoli v. U.S.*, 352 U.S. 232, 236 (1957) and *Lutwak v. U.S.*, 344 U.S. 604, 619 (1953).

In reviewing the sufficiency of the evidence, it is similarly axiomatic that it must be viewed in the light most favorable to the Government including all reasonable inferences which may be drawn therefrom. *Glasser v. U.S.*, 315 U.S. 60, 80 (1941); *Miller v. U.S.*, 382 F.2d 583 (9th Cir., 1967); *Enriquez v. U.S.*, 338 F.2d 165, 166 (9th Cir., 1964) Cert. den. 380 U.S. 957.

In the case at bar, a plethora of evidence clearly confirmed the defendant's guilt without the aid of the alleged hearsay testimony. This evidence established that on the evening of October 20, 1965, the defendant, using the alias "Mike Hastings", checked into the Admiral Hotel in Portland (TR. 109, 111-112); that sometime between 12:00 and 1:00 P.M. on October 22, 1965, the day of the robbery he entered the St. Johns Branch of the Security National Bank of Oregon, briefly surveyed the premises, and departed; that he returned around 3:00 P.M. the same day armed with a gun and carrying two shopping bags; and that he robbed the bank of $7,174.00, escaping in a blue over white Lincoln or Mercury (D.Br. 2; TR. 11-12, 13-15, 25, 32-34, 35-40, 48-50, 73, 77-81, 83). During the course of the robbery, the defendant dropped one of the shopping bags (Govt. Ex. 3). bearing the trade name "Cornet Stores" (Tr. 13-14). This bag is identical to two other Cornet Store bags found in the first floor rest room garbage can of the

Admiral Hotel on October 23rd (TR. 118-120; Govt. Ex. 3, 4A, 4B). It was also determined that a total of three Cornet Store bags similar to the bag dropped by the defendant during the robbery were sold to an unknown man in a hurry on the afternoon of the robbery by a clerk at the St. Johns Cornet Store (TR. 13-14, 102-103; Govt. Ex. 3).

Following his successful escape from the bank, the defendant returned to the Admiral Hotel where, although his room rent was paid through the following day, he hurriedly checked out without asking for or receiving a refund. (TR. 108-111)

After his hasty exit from the Admiral, the defendant registered at the Danmore Hotel, in Portland, on the evening of October 22nd, again using the name "Mike Hastings".

On this same evening, the defendant savored the first fruits of the crime. At approximately 6:30 P.M., he purchased some $68.00 worth of clothing from Mr. Ray Wheaton, a salesman for the John Helmer's Men's Store in Portland. Apparently, in an ebullient mood, secure in the feeling that his surreptitious, clandestine activities has insulated him from discovery, he informed Mr. Wheaton that he and his wife had won a sizeable quantity of money gambling in Las Vegas. Of this money, the defendant stated he had banked

$1,000.00, given $500.00 to his wife, and kept a portion of the remainder for himself (TR. 139-141). During the course of the transaction, Mr. Wheaton gave the defendant his personalized business card. This item along with the cash register receipt for this sale and the two Cornet Store shopping bags, were also found in the garbage can in the Admiral Hotel rest room on October 23rd where they had apparently been secreted by the defendant prior to checking out on the evening of the 22nd (TR. 118-120, 138-141; Govt. Ex. 4A, 4B, 5A, 5B).

In addition to his identification by manager of the Admiral Hotel, the Government's handwriting expert conclusively established that the "Mike Hastings" signatures on the three registration cards from the two hotels were subscribed by the defendant. (TR. 108-111, 173, 179; Govt. Ex. 6, 7, 8, 10, 10-A, 10-B).

Defendant's guilt in the case at bar was based upon a veritable spate of evidence, direct and indirect, and completely unaffected by any testimony concerning the license number of the escape vehicle. It is patently apparent therefore, its admission inculpated no error affecting his substantial rights and did not serve to influence the verdict of the jury. The error, if any, was harmless. Rule 52(a), Federal Rules of Criminal Procedure; *Addison v. U.S.*, 317 F.2d 808, 816-817

(5th Cir., 1963); and *U.S. v. D'Antonio,* 362 F.2d 151, 155 (7th Cir., 1966). In *D'Antonio* the Court noted that

> "Unsubstantial error is not to be viewed in an attitude separated from reality and oblivious to the context of the record and as thus isolated relied upon to furnish the basis for reversal. Otherwise, a judgment which could be affirmed would be almost impossible to achieve."

Similarly, in the words of the Supreme Court,

> "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. U.S.,* 315 U.S. 60, 83 (1942).

Accordingly therefore, it is manifest appellant's guilt was ". . . found by a jury according to the procedure and standards appropriate for . . . trials in the Federal Courts" *Zamloch v. U.S.,* 193 F.2d 889, 894 (9th Cir., 1952).

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction of the defendant be affirmed.

Respectfully submitted,

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No. 21971

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEY ALUMINUM (Incorporated),

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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No. 21971

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARVEY ALUMINUM (Incorporated),

Appellant,

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Appellee.

OPENING BRIEF FOR APPELLANTS.

Statement of Jurisdiction.

Jurisdiction of the District Court for the Central District of California was based upon Section 11(2) of the Labor Management Relations Act of 1947 as amended (73 Stat. 537, 29 U.S.C. § 161) (hereinafter the "Act"), which confers jurisdiction upon the district courts of the United States to issue orders enforcing *subpoenas duces tecum* of the National Labor Relations Board.

The jurisdiction of this Court on appeal to review the Order issued by the Central District Court exists under 28 U.S.C. §1291 and 28 U.S.C. §1294.

Statement of the Case.

This is an appeal to set aside an *ex parte* Order of the Central District Court requiring Appellant Harvey Aluminum (Incorporated) (hereinafter "Harvey Alu-

minum") to comply with the *subpoena duces tecum* issued by the appellee National Labor Relations Board (hereinafter "Board"). On October 20, 1966, the Board filed an application with the District Court for an *ex parte* Order enforcing its *subpoena duces tecum*. The application was heard by the Honorable Thurmond Clarke, Chief United States District Judge, Central District of California, on October 24, 1966. The sole question presented to the Central District Court and the sole question considered by said Court was its jurisdiction to grant *ex parte* enforcement of the *subpoena duces tecum* of the Board [Tr. 1 *et seq.*]. On November 18, 1966, the District Court issued an *ex parte* Order enforcing the Board's *subpoena duces tecum*. The Order was entered by the Board on March 6, 1967, and, thereafter, Harvey Aluminum caused this appeal to be filed.

Statement of Facts.

On April 19, 1965, the United Steelworkers of America, AFL-CIO filed a charge against Harvey Aluminum alleging elimination or reduction of overtime hours and the laying off of employees to discourage union membership in violation of Section 8(a)(1)(3) of the Act [R. 16]. After spending seven months investigating said charge, the Board on November 23, 1965, issued a Complaint [R. 35-43]. Four months later, on March 23, 1966, the Board issued an Amended Complaint against Harvey Aluminum [R. 44-48].

On June 10, 1966, the Board issued a *subpoena duces tecum* to Harvey Aluminum requiring that an extensive number of documents be produced at the hearing before the Trial Examiner [R. 50-51]. On June 20, 1966,

Harvey Aluminum filed a timely petition to revoke the *subpoena duces tecum* [R. 54-57]. Hearing was commenced on July 25, 1966. On September 20, 1966, the Trial Examiner issued a ruling modifying slightly the Board's subpoena [R. 69]. The subpoena, however, was not revoked in its entirety. On October 5, 1966. Harvey Aluminum filed an appropriate application for an interim appeal from said Trial Examiner's ruling [R. 70-72]. The Hearing was adjourned indefinitely on October 10, 1966. On October 17, 1966, the Board issued an order granting said application and on appeal, simultaneously, the Board sustained the Trial Examiner's ruling and refused to revoke the subpoena [R. 89].

On Wednesday, October 19, 1966, Mr. George Pappy of the Board telephoned Mr. Stephen E. Tallent, an attorney for Harvey Aluminum, informing Mr. Tallent that the Board was considering seeking *ex parte* enforcement of the Board's *subpoena duces tecum* by the District Court [R. 160-161]. Mr. Tallent informed Mr. Pappy that the Board could not appropriately proceed in an *ex parte* fashion so as to preclude Harvey Aluminum from receiving a hearing on the merits in connection with the Board's attempt to secure enforcement of its *subpoena duces tecum* [R. 160]. Mr. Pappy offered to permit Harvey Aluminum to have a hearing on the merits if Harvey Aluminum would stipulate not to appeal in the event that the District Court enforced the subpoena [R. 160]. When Mr. Tallent stated that he considered such a stipulation to be inappropriate, Mr. Pappy responded that the Board was under no obligation to give Harvey Aluminum a hearing in a subpoena enforcement action before the District Court and that the Board would proceed *ex parte* re-

gardless of Mr. Tallent's arguments that this procedure was unavailable to the Board [R. 160-161].

In accordance with Rule 3(i) of the Rules of the Central District governing *ex parte* proceedings, Mr. Pappy arranged to have the Honorable Thurmond Clarke, Chief United States District Judge, Central District of California, consider its subpoena enforcement action at an *ex parte* proceeding at 10:00 A.M., Monday, October 24, 1966, and advised Mr. Tallent of this fact by telephone on Thursday, October 20, 1966 [R. 142]. Mr. Pappy mailed a courtesy copy of the Board's application and memorandum in support thereof to William F. Spaulding and Stephen E. Tallent on October 20, 1966 [R. 142].

On Monday morning, October 24, 1966, the Board's subpoena enforcement proceeding came before the Chief Judge Thurmond Clarke for *ex parte* consideration. The Board argued that the District Court could and should issue an *ex parte* Order enforcing the Board's subpoena. The Board through its counsel stated to the District Court:

> "The question is, shall the principal case be delayed even further by what we consider would be an unnecessary hearing on the merits of this proceeding?" [Tr. 7, lines 14-16].

Mr. William F. Spalding, an attorney for Harvey Aluminum, questioned the District Court's jurisdiction to consider the Board's *ex parte* application for subpoena enforcement [Tr. 9, lines 9-16]. Chief Judge Thurmond Clarke then requested memoranda from both the Board and Harvey Aluminum on the question of the propriety of the District Court issuing an *ex parte*

Order enforcing the subpoena of the Board [Tr. 10-12]. The matter was taken under submission and on November 18, 1966, the District Court issued the *ex parte* Order which is the subject of this Appeal. The Order was entered by the Board on March 6, 1967.

Questions Presented.

The questions presented all involve the central issue of whether the District Court can properly grant *ex parte* enforcement to a *subpoena duces tecum* of the Board. This basic issue gives rise to the following questions:

(1) Must the Board give legal otice of its subpoena enforcement proceeding and cause the issuance of process bringing the adverse party within the jurisdiction of the District Court?

(2) Are the Board and the District Court free to ignore the minimum requirements of the Federal Rules of Civil Procedure and of Due Process of Law in a subpoena enforcement proceeding?

(3) Is an order of the District Court valid when issued without any hearing, or opportunity for hearing, on the merits?

ARGUMENT.

On Thursday, October 20, 1966, the Board mailed on attorney for Harvey Aluminum a courtesy copy of certain papers which the Board intended to present to the District Court for both initial consideration and final ruling on the following Monday morning, October 24, 1966. The Board did not serve Harvey Aluminum with a summons or any other conceivably appropriate process of the District Court to give legal notice of the commencement of a subpoena enforcement action or to bring Harvey Aluminum under the jurisdiction of that court.

The Board requested and the District Court issued an *ex parte* Order enforcing the *subpoena duces tecum* without complying with any of the minimum requirements of the Federal Rules of Civil Procedure made applicable to such proceedings by Rule 81(a)(3) of the Federal Rules of Civil Procedure (28 U.S.C.A. Rule 81(a)(3) (hereinafter "Federal Rules"). Rule 81(a)(3) was applicable to the District Court proceeding and while the District Court may truncate the ordinarily applicable Federal Rules when an appropriate request for such an order is made after the proceeding has been appropriately commenced, neither the Board nor the District Court is free to completely ignore the Federal Rules and to proceed on an *ex parte* basis.

Minimum requirements of Due Process of Law require that a party against whom enforcement of a *subpoena duces tecum* is sought be given an opportunity for a hearing on the merits of said enforcement. The *ex parte* procedure adopted by the Board precluded Harvey Aluminum from obtaining a hearing, or opportunity for hearing, on the merits of the Board's subpoena enforcement.

I.

The Board Failed to Provide Harvey Aluminum With Legal Notice of the Subpoena Enforcement Proceeding.

In attempting to set in motion its subpoena enforcement proceeding before the District Court, the Board at no time secured the issuance of a summons, order to show cause, or other process of Court. Rather, counsel for the Board assumed that it could properly secure *ex parte* enforcement of its subponea by the District Court and therefore did not give Harvey Aluminum any legal notice in connection with enforcement.

The only time when the notice requirements of the Federal Rules may be avoided without an order of court is where the matter in question is one which can be heard and ruled on *ex parte*. Rule 12 of the Federal Rules provides for twenty (20) days after the service of the summons and complaint in which to answer or otherwise plead. Rule 6(a) and (d) of the Federal Rules requires that a party moving by way of motion give the opposing party at least five (5) days' notice excluding Saturday and Sunday unless a different period is fixed by order of court. The Board did not file or serve a summons and complaint nor did it elect to proceed by way of order to show cause. No order shortening time was granted by the District Court. Having elected to proceed *ex parte*, no process of any type issued from the District Court and the attorneys for Harvey Aluminum in the unfair labor practice proceedings were made aware of the Board's enforcement action only two days, excluding Saturday and Sunday, prior to the District Court's consideration of the matter.

It is submitted by Harvey Aluminum that neither the Act nor the Federal Rules permit the Board to seek *ex parte* enforcement of the subponea (discussion Section II *infra*). In the absence of the availability of such an *ex parte* action, the Board failed to provide Harvey Aluminum with any legal notice of the proceeding held on October 24, 1966. The absence of legal notice was brought to the attention of the District Court on October 24, 1966 [Tr. 11, lines 15-21].

II.

Subpoena Enforcement Actions Necessitate Compliance With the Minimum Requirements of the Federal Rules.

In 1946, Rule 81(a)(3) was amended to add the following language:

> "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."
>
> Federal Rules, Rule 81(a)(3).

The above quoted portion of Rule 81(a)(3) has continued in effect from its amendment to the present and establishes the applicability of the Federal Rules to subpoena enforcement actions unless otherwise provided by statute, rule of court or order of court. Thus, unless the Board can establish the appropriateness of an *ex parte* proceeding pursuant to Rule 81(a)(3), the Or-

der which is the subject of this Appeal must be vacated and set aside.

Section 11(1) of the Act authorizes the Board to issue *subpoenas duces tecum* during the course of an investigation or proceeding under the Act. The Board is not granted authority to compel enforcement of such *subpoenas duces tecum.* In the event of noncompliance, the only recourse of the Board is to seek enforcement in the appropriate district court. Such enforcement proceedings are provided for by Section 11(2) of the Act which provides as follows:

> "In case of contumacy or refusal to obey a subpena issued to any person, any *district court* of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, *upon application by the Board shall have jurisdiction to issue* to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis added.)
>
> Labor Management Relations Act, 1947, as amended (73 Stat. 537, 29 U.S.C. § 161(2)).

Section 11(2) of the Act is couched in the general language and does not specify any procedure to be

followed in subpoena enforcement actions. There is no language in Section 11(2) which makes the Federal Rules inapplicable to a subpoena enforcement proceeding within the "otherwise provided by statute" language of Rule 81(a)(3)(1). To support its position that Section 11(2) of the Act permits the Board to proceed on an *ex parte* basis, the Board is forced to argue that the words "by application" in that section establishes a specific *ex parte* enforcement procedure within the "otherwise provided" language of Rule 81(a)(3). This argument finds no support in the decisions rendered subsequent to the 1946 amendment of Rule 81(a)(3) (nor for that matter prior to 1946) and is contrary to the approach taken by the Board in other subpoena enforcement actions before the Central District Court of California. In *N.L.R.B. v. British Auto Parts, Inc.* (C.D. Cal. 1967), 266 F. Supp. 368, the Board itself, confirmed the position of Harvey Aluminum concerning the applicability of the Federal Rules to a subpoena enforcement action under Section 11(2) of the Act. There the District Court for the Central District of California reviewed the proceeding before the Court stating:

> "This cause came on to be heard upon a complaint for an order compelling production of records filed by the plaintiff National Labor Relations Board on January 16, 1967, and upon the issuance of a rule to show cause on that date setting the matter for hearing on February 27. On February 10, 1967, defendant filed an answer and on February 20, defendant filed motions to dismiss the said complaint and for summary judgment. The Board filed no response to defendant's mo-

tions; the parties stipulated that the points and authorities filed by the Board in support of the complaint would be deemed its opposition to the said motions and the points and authorities filed by defendant in support of its motions would be deemed its opposition to the complaint."

N.L.R.B. v. British Auto Parts, Inc., 266 Fed. Supp. 368, 370.

If indeed the Board's position is that the words "by application" in Section 11(2) of the Act actually mean "by *ex parte* application", then why has the Board itself failed to follow this *ex parte* procedure in other subpoena enforcement actions pending in the same District Court at almost the same time.

A. Appellate Courts Have Consistently Found Rule 81(a)(3) Applicable in Analogous Subpoena Enforcement Situations.

The courts reviewing the approaches taken by district courts in enforcing subpoenas for administrative agencies operating under the statute analogous to Section 11(2) of the Act have uniformly found the Federal Rules to be applicable. In *United States. v. Powell* (1964), 379 U.S. 48, the Supreme Court considered an administrative subpoena issued under the provisions of 26 U.S.C. §4604(b) and 4702(b) pursuant to which the Internal Revenue Service "may apply to the judge of the District Court" and the "District Court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers or other data." In footnote 18, the Court remarked:

"Because § 7604(a) contains *no provision specifying the procedure to be followed* in invoking the

> court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co. 128 F2d 731. The proceedings are instituted *by filing a complaint, followed by answer and hearing.*" (Emphasis added).
>
> *United States v. Powell,* 379 U.S. 48, 58.

This circuit has held the Federal Rules applicable to its subpoena enforcement procedures. In *Martin v. Chandis Securities Co.* (9th Cir. 1942), 128 F. 2d 731, the Court had before it the matter of enforcing a subpoena issued by the Internal Revenue Service. The Code Section granted the district court jurisdiction "by appropriate process to compel" the production of evidence. The Court stated:

> "The Internal Revenue Code contains *no provision specifying the procedure to be followed* in invoking the jurisdiction of the court below. We believe, as appellant contends, that the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are applicable. The pleading denominated a *'Petition' will be treated as a complaint, there being no provision for a 'Petition'.* Under Rule 8(a), it was *necessary for the complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.*" (Emphasis added).
>
> *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734.

The *Chandis* decision was cited with approval by the Supreme Court in *United States v. Powell, supra.* Just as in *Chandis*, the application of the Board in the in-

stant case could have been treated by the District Court as a complaint and a summons issued.

In *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission* (10th Cir. 1964), 328 F. 2d 285, the court had before it an order of the district court enforcing a subpoena of the Securities and Exchange Commission. The statute provided:

> "In case of contumacy or refusal to obey a subpena issued to any person, any of the said *United States courts,* within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, *upon application* by the Commission *may issue* to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (Emphasis added).
>
> 15 U.S.C. § 77v(b), p. 152.

The relevant wording of the statute in question is identical to Section 11(2) of the Act. The court reversed the district court's order enforcing the subpoena and in the process noted (328 F. 2d at 288) (apparently approvingly) that the matter had been handled below by application of the Rules of Civil Procedure and, particularly, the Summary Judgment Rule. In that case the Court stated that the Commission's "application" was considered to be its "pleadings" (328 F. 2d at 286).

B. District Courts Ruling on Subpoena Enforcement Have Found Rule 81(a)(3) Applicable.

The district courts giving initial consideration to subpoena enforcement actions in analogous situations have applied Rule 81(a)(3). In *Long Beach Federal Savings and Loan Association v. Federal Home Loan Bank Board* (S.D. Cal. 1960), 189 F. Supp. 589, the court was petitioned to enforce the subpoena of the Federal Home Loan Bank Board under the Housing Act of 1954. The wording of the Housing Act authorizing court enforcement of subpoenas was almost identical with that of Section 11(2) of the National Labor Relations Act. As quoted in the court's decision the Housing Act provided:

> "[A]nd the board or any *interested party may apply* to the United States District Court where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and *such court shall have power to order* and require compliance therewith." (Emphasis added).
>
> *Long Beach Federal Savings & Loan Assoc. v. Federal Home Loan Bank Board,* 189 F. Supp. 589, 595.

Apart from the case on its merits the court made the following relevant holdings:

> "By F.R.Civ.P. 81(a)(3) the Federal Rules of Federal Procedure apply to proceedings to compel the giving of testimony or the production of documents in accordance with a subpoena issued by an officer or an agency of the United States under any statute of the United States except as 'otherwise provided' by statute or rules of the District

Court, or by an order of the court in the proceedings.

* * * *

"Thus, there is no statute by which the *procedure* for enforcement of administrative subpoenas is 'otherwise provided' than by Federal Rules of Civil Procedure as provided in F.R. Civ.P. 81(a)-(3). There are no rules of this court, or order of this court in this proceeding 'providing otherwise,' and if there were, it is at least doubtful if either would prevail over the statutory command just above quoted."

Long Beach Federal Savings & Loan Assoc. v. Federal Home Loan Bank Board, 189 F. Supp. 589, 595-596.

In *Kennedy v. Rubin* (N. D. Ill., 1966), 254 F. Supp. 190, the court had before it a proceeding to enforce a subpoena issued by the Internal Revenue Service. The statutory provision in question referred to the subpoena as a "summons"; but it was in fact nothing more than a *subpoena duces tecum.* The court stated:

"It is clear, initially, that the statutes at issue, Sections 7402(b) and 7604(a), provide only that the United States District Court for the district in which respondent resides shall have jurisdiction by appropriate process to compel appearance, testimony and/or production. There is no indication that the Federal Rules would not apply to such an enforcement proceeding. In the *absence* of a clear *negative statutory pronouncement,* or compelling circumstances, requiring a contrary order by this Court, it would seem apparent under our reading of Rule 81(a)(3) *that the Federal Rules* gen-

> erally applicable to civil proceedings *must be utilized.* Indeed, this approach has been indicated to be correct by the Supreme Court of the United States in United States v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964). * * *" (Emphasis added).
>
> *Kennedy v. Rubin,* 254 F. Supp. 190, 191-192.

Section 11(2) of the Act contains no such "clear negative statutory pronouncement." The court then went on to reject the petitioner's undue delay argument, a position quite similar to that of the Board below, as follows:

> "At best, petitioner may prevail only upon a strong showing of extraordinary circumstances which might justify suspension of the customarily applicable federal rules. *Petitioner's arguments relating to its need for 'swift summary adjudication' do not meet this burden.* Respondent has raised important defenses to the enforcement action instituted herein. While often the proverbial wheels of justice must grind slowly, it is just such deliberation, resulting from formal procedure, which insures each party in orderly hearing and concordant full protection of the laws. * * *" (Emphasis added).
>
> *Kennedy v. Rubin,* 254 F. Supp. 190, 192.

In all of the decisions involving subpoena enforcement since the adoption of amended Rule 81(a)(3) in 1946 where the relevant statute has been couched in general terms such as "by application" found in Section 11(2) of the Act, the courts have found the Federal

Rules applicable and an opportunity to file responsive pleadings and to obtain a hearing on the merits has been granted. The term "application" as used in Section 11(2) is obviously not a word of art. It does not create any new type of procedure in the Federal District Courts but merely authorizes resort to the court in the general sense. Indeed, the word "application" is a generic term which includes all of the means of seeking court action. To overcome the presumptive application of Rule 81(a)(3), there must be a clear statutory pronouncement establishing the procedural steps which must be followed. Where, as here, reliance must be placed upon a broadly worded statute without any such procedural ramifications, no District or Appellate court other than in the instant case has held that Rule 81(a)-(3) is inapplicable.

The only cases finding an exception to the full use of the Federal Rules through the Rule 81(a)(3) "otherwise provided by statute" provision are *United States v. Associated Merchandising Corporation* (S.D.N.Y. 1966), 256 F. Supp. 318 and *Federal Maritime Com'n v. Transoceanic Terminal Corp.* (E.D. Ill. 1966), 252 F. Supp. 743. Even in these cases, the Federal Rules were observed to the extent necessary to permit a full hearing on the merits. The Federal Rules were truncated but not ignored completely as they were in the instant case.

In *United States v. Associated Merchandising Corporation, supra*, 256 F. Supp. 318, the Court was con-

sidering a subpoena enforcement involving the Federal Trade Commission and the statute in question granted the district court jurisdiction to order compliance by issuing a "writ of mandamus." The court distinguished the Supreme Court's decision in *United States v. Powell, supra,* as follows:

> "The Supreme Court's remark in *Powell* was premised on the fact that the Internal Revenue Code does not specify the procedure to be followed. It says merely that the court shall have jurisdiction 'by appropriate process' to compel production. 15 U.S.C. § 49, on the contrary, does specify the procedure. It confers jurisdiction upon the court to proceed by a writ of mandamus."
>
> *United States v. Associated Merchandising Corp.,* 256 F. Supp. 318, 320-321.

In view of the specific statutory language the court concluded:

> "I cannot believe that Congress contemplated, when it provided for the issuance of mandamus, that respondents would be entitled as a matter of right to such protracted discovery." (p. 321).

In permitting the Federal Trade Commission to proceed by application and order to show cause, the district court did not recite how much of the Federal Rules had been observed but a hearing on the merits of the matter was not foreclosed. Even under the specific statutory language in question the court stated:

> "I will set the government's application down for a hearing in open court on September 9, 1966, at 10:00 A.M. Not later than September 2, respondents shall serve and file their answer to the

application and their affidavits in opposition to it. At the hearing, both sides, if they so desire, may offer testimony in support of their respective contentions on the merits."

United States v. Associated Merchandising Corp., 256 Fed. Supp. 318, 321.

In *Federal Maritime Comm'n v. Transoceanic Terminal Corp., supra,* 252 Fed. Supp. 743, the court relied upon the statutory grant of power to enforce Federal Maritime Commission subpoenas by "writ of injunction", the courts power to modify the Rule 81(a)(3) requirements and the existence of an emergency situation to permit the Commission to proceed by an application and order to show cause. Again the full procedure followed by the court is not clear from the opinion but the right to a trial on the merits was clearly preserved. The statute in question authorized the District Court to enforce obedience where proper "by a writ of injunction or other proper process". After recognizing the applicability of Rule 81(a)(3) the court stated:

"Rule 81(a)(3) does not command that there be a complaint and answer in all civil actions. Were Rule 81 to require the lengthy complaint and answer procedure, the federal courts would be unable effectively to adjudicate emergency injunctive petitions. It is for that reason that Rule 81 contains the two exceptions allowing procedure to be governed by other statutory provisions or by court order in the proceedings. As noted above, both the I.C.C. Act and the Shipping Act provide that subpoena enforcement may be by writ of injunction. Moreover, the court is specifically

permitted to utilize other procedures under Rule 81. * * *"

Federal Maritime Com'n v. Transoceanic Terminal Corp., 252 F. Supp. 743, 746.

Thus, the court relied both upon specific statutory language and its ability under Rule 81(a)(3) to modify the procedural rules applicable to the enforcement proceeding in permitting the Federal Maritime Commission to proceed by a hearing under an order to show cause. Even under this special statutory language, however, the court indicated that the truncation of proceedings was based on a large part upon the showing of the emergency nature of the action.

"Enforcement proceedings for other Commission orders, and possibly in a special case even subpoena enforcement, perhaps should proceed in a different manner. This case, however, with its somewhat emergency nature because of the impending opening of the inland shipping season on the Great Lakes, ought to proceed before the Commission as expeditiously as possible."

Federal Maritime Com'n v. Transoceanic Terminal Corp., 252 F. Supp. 743, 745.

The District Court in the instant proceeding did not meet these minimum requirements; Rule 81(a)(3) was not found to be applicable, no request for a truncated proceeding was made, no hearing on the merits was permitted and the Board made no showing that an emergency situation existed. The absence of such an emergency situation is clearly demonstrated by the history of the Order issued by the District Court. The Order was issued November 18, 1966 and the Board

did not have the Order entered until March 6, 1967 [R. 122-23]. The absence of both specific statutory language indicating the propriety of a truncated proceeding and the absence of an emergency situation demonstrates that the normal Federal Rules of Civil Procedure should have been applied by the District Court. Even the existence of an emergency, however, would not sanction the *ex parte* approach adopted by the District Court.

C. The District Court Did Not Issue an Order Modifying the Application of Rule 81(a)(3).

Harvey Aluminum was informed on or about October 20, 1964, that appellee would appear before Chief Judge Clarke on October 24, 1966, to secure an *ex parte* Order enforcing the Board's *subpoena duces tecum.* When Chief Judge Clarke considered the matter on October 24, 1966, the only question before him and the only question considered by him was whether the Board could proceed by *ex parte* Order in enforcing its *subpoena duces tecum* [Tr. 1 *et seq.*]. Such *ex parte* Order was subsequently issued [R. 122-23]. A reading of the transcript of the proceeding on October 24, 1966 [Tr. 1 *et seq.*] and the memoranda submitted thereafter at the request of Chief Judge Clarke [R. 109-121, 92-107], makes it quite evident the sole question considered by the District Court was whether Rule 81(a)(3) was even presumptively applicable to the enforcement proceedings then being considered. By ordering *ex parte* enforcement, the District Court was not concluding that though Rule 81(a)(3) applied, the District Court would modify the procedure provided for therein. Rather, the District Court by issuing

its *ex parte* Order confirmed the Board's argument that Rule 81(a)(3) was inapplicable to enforcement proceedings brought by the Board under Section 11(2) of the Act. The District Court even ignored the extremely truncated order to show cause alternative posed by the Board at one point [R. 14].

D. The Board Relied Upon Superseded Authority in Seeking Ex Parte Enforcement of Its Subpoena.

In seeking *ex parte* consideration of its subpoena enforcement action in the Central Distrct Court, the Board relied upon three cases decided in the early 1940's [R. 3]. See, *Goodyear Tire & Rubber Co. v. N.L.R.B.* (6th Cir. 1941), 122 F. 2d 450; *Cudahy Packing Co. v. N.L.R.B.* (5th Cir. 1941), 117 F. 2d 692; *Bowles v. Bay of New York Coal & Supply Corp.* (2d Cir. 1945), 152 F. 2d 330. All of these decisions were handed down before the 1946 amendment of Rule 81(a)(3) of the Federal Rules which adopted the position that the enforcement of administrative subpoenas is governed by the Federal Rules. The Board did not cite and could not cite any decisions since the 1946 amendment of Rule 81(a)(3) which supported its *ex parte* argument, since all of those decisions make it clear that the Board's position is erroneous. An examination of the decisions cited by the Board demonstrates that even in these cases evidence was submitted and some type of hearing was held. Moreover, the decision in *Martin v. Chandis Securities Co., supra*, 128 F. 2d 731, demonstrates that the Ninth Circuit even prior to the amendment of Rule 81(2)(3) had adopted the position that the Federal Rules were applicable to the subpoena enforcement actions of administrative agencies.

During the *ex parte* proceeding before the District Court, the Board relied heavily upon the *Goodyear* and *Cudahy* decisions [Tr. 6-7]. In a subsequent hearing before the District Court, counsel for the Board confessed error in relying upon these decisions to support *ex parte* enforcement of the subpoena:

> "Now, we have discovered since the court granted its order that in the Goodyear Tire & Rubber case, and the Cudahy Packing case, which we relied on, which designated this proceeding—that is, a subpoena enforcement proceeding of the National Labor Relations Board — as a summary proceeding, we discussed by searching in the District Court records in those cases that, in fact, those proceedings were commenced by orders to show cause. It doesn't appear in the Opinion of the Circuit Court, but they were commenced by orders to show cause. They are old cases, but we did find records." [Tr. 22, lines 1-12].

The Board has thus established that *ex parte* enforcement of Board subpoenas was not available even before the amendment of Rule 81(a)(3).

III.

Harvey Aluminum Was Entitled to a Full Consideration of Its Arguments and a Hearing on the Merits Before the District Court.

By seeking *ex parte* enforcement of its subpoena, the Board demonstrated that it considered the District Court's function to be ancillary to the Board's own proceeding and thus devoid of any requirement for independent inquiry. District Court proceedings do not merely grow out of Board proceedings. This was recog-

nized by the Ninth Circuit Court of Appeals in *Flotill Products, Inc. v. FTC* (9th Cir. 1960), 278 F. 2d 850, where in connection with an enforcement proceeding under the Federal Trade Commission Act, the court stated:

> "The proceeding in the district court was not ancillary to prior administrative action but formed an *independent cause of action framed by the pleadings therein.* I.C.C. v. Brimson, 1894, 154 U.S. 447, 487, 14 S.Ct. 1125, 38 L.Ed. 1047. * * *" (Emphasis added.)
>
> *Flotill Products, Inc. v. FTC,* 278 F. 2d 850, 852.

The Board's *ex parte* procedure precluded proper action by the District Court. The corollary of the *Flotill* decision is that the subpoena enforcement proceeding now before the District Court is a "case or controversy" in the full meaning of the term. In *Crafts v. FTC* (9th Cir. 1957), 244 F. 2d 882, the court refused enforcement of an administrative subpoena stating:

> "It cannot be too often reiterated that the attempt to enforce an administrative subpoena *initiates a case or controversy.* All questions relating to jurisdiction of the court, authority of the administrative body, reasonableness of the demand under all the circumstances, with regard for due process and protection of individual rights, and relevancy of the testimony and documents demanded are justiciable. ***" (Emphasis added).
>
> *Crafts v. FTC,* 244 F. 2d 882, 890, rev'd on other grounds, 355 U.S. 9.

Harvey Aluminum was not provided with the opportunity to question the Board's subpoena in any manner. While arguing the appropriateness of the automatic enforcement of its subpoena through *ex parte* consideration by the District Court, the Board heavily relied upon *N.L.R.B. v. United Aircraft Corp.* (D.C. Conn. 1961), 200 F. Supp. 48 *affirmed* (2d Cir. 1962), 300 F. 2d 442, where the court stated in reference to enforcing a Board subpoena:

> "A proceeding for judicial enforcement of a subpoena *involves more than an automatic issuance of the order* and it has been held by the Supreme Court that such a proceeding is a 'case' or 'controversy'." (Emphasis added).
>
> *N.L.R.B. v. United Aircraft Corp.,* 200 F. Supp. 48, 50.

The fact that the District Court's jurisdiction is neither ancillary nor subservient to the related Board proceeding must be the conclusion from the above as well as *Chapman v. Maren Elwood College* (9th Cir. 1955), 225 F. 2d 230. The court there stated most forcefully:

> "The sole ground for the intervention of the federal courts to assist executive or administrative investigations is that the passing of such an order is a judicial act, with all which that phrase implies. The proceeding must have as its basis a 'case' or 'controversy' under the Federal Constitution. The agency asserts its subpoena rights. The college denies. 'Thus has arisen a dispute involving rights or claims asserted by the respective parties to it.'
>
> * * *

> "The exercise of the judicial function *implies consideration and adjudication.* The slanders upon administrative investigations might have found some justification were it not that 'the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice'. Cardozo, J., dissenting in Jones v. Securities and Exchange Commission, 298 U.S. 1, 33, 56 S.Ct. 654, 665, 80 L.Ed. 1015. The key question in enforcement of the demand to produce records is whether it is reasonable or arbitrary.
>
> * * *
>
> "The proceeding is equitable in character. Equitable consideration should prevail. There is no power to compel a court to rubberstamp action of an administrative agency simply because the latter demands such action.***" (Emphasis added).
>
> *Chapman v. Maren Elwood College,* 225 F. 2d 230, 231-234.

Ex parte procedure completely ignores the basic function of requiring the Board to seek enforcement of its subpoenas in the district court rather than having the subpoenas self enforcing. By eliminating the district court's independent inquiry function through *ex parte* enforcement, the statutory structure of the Act the Federal Rules, the case or controversy requirements of the Constitution, and the proper function of Article III courts are ignored.

In *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission, supra,* 328 F. 2d 285, the Tenth Circuit reversed the lower court's enforcement of a subpoena issued by the Securities and Exchange

Commission because the lower court had taken too restrictive a view of its function in making factual determinations as a predicate to the validity of the subpoena requested. The court pointed out:

> "As indicated, the parties submitted the matter on motions for summary judgment, and nothing appears in the record to show the Rules of Civil Procedure were not applied. The affidavit of appellant raised questions of fact bearing on the question whether the request was within the statutory authority of the Commission, and whether it was arbitrary. The Government's position here assumes that these facts cannot ever be material because even if established the court must nevertheless enforce the subpoena. This position is not correct. The facts are material because they are relevant to the question of *whether or not the Commission was acting arbitrarily or in excess of its statutory authority.* The factors were reserved to the courts by the decision in Okl. Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614. * * *" (Emphasis added).
>
> *Shasta Minerals & Chemical Co. v. Securities & Exchange Commission,* 328 F. 2d 285, 288.

To similar effect see *N.L.R.B. v. Anchor Rome Mills* (5th Cir. 1952), 197 F. 2d 447.

It is submitted that it is clear both from the Act and the decisions of the courts that the district court is not a clerk for the National Labor Relations Board in the matter of enforcing subpoenas. Judicial enforcement is not a mere ministerial act. There is a case or controversy to be litigated in the judicial sense. The rules of procedure, substantive law and common sense

dictates that the Board like any other litigant must file an adequate pleading and serve it and some type of process, in order for the court to acquire jurisdiction over the defendant and the proceeding. The defendant must be given the time to answer provided by the Federal Rules, and when issue is joined either party is then free (but only then) in accordance with the Rules, to move in any manner appropriate. Until the matter is at issue nothing can appropriately be done or decided. The court may well desire to suspend certain rules; but until issue is joined this cannot be known and *ex parte* enforcement is inappropriate under any circumstances.

The ruling of the District Court in the proceeding now before this Court precluded Harvey Aluminum from obtaining any form of hearing on the merits in the District Court. The Supreme Court in *Reisman v. Caplin* (1964), 375 U.S. 440 in a subpoena action under the Internal Revenue Code held:

> " 'Any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings.' "
>
> *Reisman v. Caplin,* 376 U.S. 440, 446.

Accord:

> *Anheuser-Busch, Inc. v. Federal Trade Com'n* (8th Cir. 1966), 359 F. 2d 487.

In *McGarry's, Inc. v. Rose* (1st Cir. 1965), 344 F. 2d 416, the Court of Appeals upheld the district court's

view of the petition and order to show cause in the following language:

> "The record in the instant case shows that appellants were served with orders to show cause and petitions to enforce summonses, each of which fully apprized them of the nature of the relief sought by appellee. In the two-month interval between the issuing of the show cause order and the actual hearing thereon, appellants and their counsel had ample time to evaluate and study the petitions and show cause orders, and to file both short and lengthy motions to dismiss, as well as an answer, all of which put in issue before the district court the contrary positions of the parties on this matter. *A reading of the opinion in United States v. Powell, supra, leaves no doubt that the thrust thereof is to insure that a taxpayer obtain an adversary-type hearing in the district court* prior to his being forced to comply with an administrative summons which he challenges in good faith. That the procedure followed in the instant case fully complies with the essential requirements of the Powell decision appears so clearly from the record herein as to preclude any need for further discussion of appellants' contentions with reference thereto." (Emphasis added).
>
> *McGarry's, Inc. v. Rose*, 344 F. 2d 416, 418.

The courts have preserved the right to a hearing on the merits in subpoena enforcement actions even where an emergency situation existed and the statute in question explicitly provided for district court enforcement of an extremely summary nature. Here, where no emergency has been demonstrated and the

relevant statute does not provide for a special procedure, the Federal Rules have been ignored rather than truncated and Harvey Aluminum has been denied any opportunity to present and to have a hearing on its defenses to the subpoena enforcement. It is submitted that the *ex parte* Order secured by the Board is invalid and that Harvey Aluminum has been denied Due Process of Law.

Conclusion.

It is respectfully submitted that the decision of the District Court for the Central District of California enforcing the *subpoena duces tecum* of the Board against Harvey Aluminum be reversed and that the Order issued pursuant to said decision be vacated and set aside.

Dated: October 6, 1967.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM F. SPALDING

No. 21,971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY ALUMINUM, INC., APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE,

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,971

HARVEY ALUMINUM, INC., APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court upon an appeal from an order of the District Court of the United States for the Central District of California granting the Board's application for enforcement of a subpena under Section 11(2) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq., hereafter referred to as the Act. The jurisdiction of the Court is invoked under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE

A. Proceedings before the Board

On April 19, 1965, the Union[1/] filed a charge with the National Labor Relations Board that Harvey Aluminum, Inc. ("the Company") had

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1/ United Steelworkers of America, AFL-CIO.

violated Section 8(a)(1) and (3) of the Act by eliminating or reducing overtime for employees and by discharging employees in order to discourage membership in the Union (R. 16-34).[2/] Thereafter, the Regional Director of the Board issued a complaint and notice of hearing and an amended complaint and notice of hearing under Section 10(b) of the Act, alleging that respondent had violated Section 8(a)(3) and (1) of the Act by reducing and eliminating overtime for its production and maintenance employees, by laying off employees, by threatening employees with reduction and elimination of overtime, and by informing employees that overtime had been reduced because the Union had won a Board conducted election and because employees supported the Union (R. 37-38, 40-43). The complaint and amended complaint were duly served upon the Company, which filed answers thereto (R. 44-48).

In order to obtain the records necessary to prove the allegations of the complaint, the Regional Director, pursuant to Section 11(1) of the Act, caused a subpena duces tecum to be issued and served upon the Company (R. 49-53). The subpena directed the Company to produce at the hearing payroll records showing: (1) weekly totals of hours worked between October 1964 and April 1965 by production and maintenance employees, the names of such employees and the departments in which they worked; (2) names of employees hired during December 1964 and January through March 1965 and

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2/ References to those portions of the Record printed in Volume 1, Transcript of Record are designated "R." References to the transcripts of the hearings in the District Court are designated "Tr."

the departments to which they were assigned; and (3) names of employees laid off in the foundry department of the extrusion division during January and February 1965 and the dates of any such layoffs. As an alternative, the subpena provided that the Company could produce a signed statement setting forth the requested information if it also made the appropriate records available for verification (R. 49).

Respondent filed a petition to revoke the subpena, on the grounds that the subpena requested irrelevant and immaterial information and put an unreasonable burden on respondent (R. 54). The Trial Examiner then modified the subpena to provide that Board agents would do the work of copying the information from the records, if respondent showed that the original subpena was burdensome (R. 69). The Company then filed an application for an interim appeal to the Board (R. 70-77) which was granted on October 17, 1966, with the Board sustaining the Trial Examiner's ruling and enforcing the subpena (R. 89). Respondent, however, still refused to comply with the subpena.

B. Proceedings before the District Court

On Thursday, October 20, 1966, the Board filed an application in the District Court under Section 11(2) of the Act for enforcement of its subpena (R. 9-90). Attached as exhibits thereto were copies of all the pleadings, motions, memoranda and rulings in the unfair labor practice proceeding dealing with the subpena, including the defenses raised by Harvey against compliance and the Trial Examiner's and Board's rulings thereon (R. 16-89). The application requested either an order, "issued forthwith," enforcing the subpena, or an order directing Harvey to appear before the

Court and show cause why an order should not issue enforcing the subpena (R. 14). The application was accompanied by a memorandum of points and authorities on the procedural and substantive issues raised by the application (R. 2-8). Copies of the application, exhibits and memorandum were served by mail that day upon counsel for Harvey (R. 142).

An order did not "issue forthwith" as prayed in the application. Rather, Chief Judge Thurmond Clarke set the case for hearing before himself on Monday, October 24, at 10 a.m. -- the next regular date and time when motions and orders to show cause are heard.[3/] Board counsel notified company counsel by telephone on October 20 of the date and time of the hearing on the application, and of the judge who would hear the case (R. 142).

At the hearing on the application, counsel for the Board, George Pappy, spoke first. He explained to the Court what material was subpenaed and why the Board needed it, and urged that the application and attached exhibits showed that all the elements necessary for an order enforcing the subpena were present (Tr. 3-8). Mr. Pappy argued that therefore, a "hearing on the merits" of the application was "unnecessary" (Tr. 7). Mr. Pappy also pointed out that there was precedent in that and other courts for treating the application as a "summary proceeding not requiring the issuance of process, hearing, findings of fact, or the elaborate process of a civil suit" (ibid.).

3/ Under Rule 3(b) of the Rules of the Central District of California, all motions and orders to show cause are heard on Mondays beginning at 10 a.m. Rule 3(j) states that applications for ex parte orders shall be heard first. The case at bar came on for hearing at 11 a.m. after the Court heard other matters (Tr. 3).

After Mr. Pappy had concluded, Chief Judge Clarke announced that he would "hear from the other side" and that he would "take the matter under submission" after that (Tr. 8-9). William F. Spalding, counsel for Harvey, then approached the bench and announced he was entering a "special appearance" on behalf of his client because, he claimed, the court had "no jurisdiction of this matter, none over the defendant personally" (Tr. 9).

Chief Judge Clarke observed that Mr. Spalding had filed no memorandum of points and authorities, and offered to give him 5 or 10 days to reply to the Board's memo. To this offer, Mr. Spalding replied (Tr. 10): "Well, my reply to it, sir, would solely be in the nature of a special appearance and I am willing to so appear. I think that counsel is totally mistaken." At the urging of Chief Judge Clarke, Mr. Spalding finally agreed to file a written response to the application after receiving assurances from the Court that submitting it would not constitute a waiver of his challenge to the Court's jurisdiction (ibid.). The Court gave Mr. Spalding 10 days to file his response, and then stated (Tr. 11):

> ". . . when that arrives I will mark it /i.e., the application/ submitted. I will have to rule on the matter, and if there is anything you want to state orally now in addition to what you are to state in written form, you can, Mr. Spalding."

In response to the Court's invitation to say "anything" with respect to the Board's application, Mr. Spalding said (Tr. 11-12):

> "I will only state that the plaintiff here is totally mistaken in his rights. He seems to assume

the Federal Rules of Civil Procedure have no application. He filed a document with the Clerk's Office under a Miscellaneous matter. There is no process asked for or issued. Rule 81 requires that the Federal Rules of Civil Procedure be followed on such an application as we have here. It means he has to file a complaint, he has to state grounds for relief, get summons out, wait to get it served and he has got to wait for an answer, and then and only then can a motion for an order to show cause or a summary judgment or what-have-you be made, but until they have served process there is nothing even before the court, and of course they are relying on an antiquated case in 1941, which has been overruled by statute.

This is essentially what my position will be and I will cite the rules and the theory sustaining them."

Mr. Spalding's memorandum rearticulated this position and stated that the Company would refuse to present any defense on the merits of the subpena "until brought within the Court's jurisdiction" (R. 106). After the Board filed a reply memorandum, the Court, on November 18, signed an order enforcing the subpena (R. 122-123). No notice of signing the order was given to the parties and the order was not entered until March 6, 1967 (ibid.). Notice of appeal was filed by the Company on April 20 (R. 131).

On May 1, the Board filed a motion to vacate the order and asked the District Court to indicate whether it would issue an order to show cause why the Board's subpena duces tecum should not be enforced, in order to clarify the record on appeal (R. 135). The Court, after a hearing on May 10, denied the motion on May 16, without opinion (R. 166).

ARGUMENT

THE DISTRICT COURT PROPERLY ENFORCED THE BOARD'S SUBPENA

A. The Company had notice of the subpena enforcement proceeding, and was afforded an opportunity to raise any defenses it wished to the granting of the Board's application

In its brief, appellant repeatedly describes the order of the District Court enforcing the Board's subpena as having been issued after an ex parte proceeding in which the Company had no opportunity to be heard on the merits of the Board's application. The Company errs in this description.

Black's Law Dictionary (4th ed., West Publ. Co., 1951), in defining the term "ex parte", states:

> "A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested."

The record in the instant case shows that there was both notice to, and contestation by, the party adversely interested in the proceeding. A copy

of the Board's application, exhibits and supporting memorandum was mailed to counsel for Harvey the day it was filed, October 20, 1966. That same day, counsel for Harvey was notified personally by counsel for the Board of the date, time and place of a hearing on the application. When the case came on for hearing four days later, counsel for both sides were present. The transcript of that hearing shows that counsel for the Company knew what the case was about, that he was given an opportunity to present his arguments to the Court orally, and that he was also given 10 days to present his defenses in writing.

Contrary to the Company's claim in its brief to this Court (pp. 2, 21), the hearing on October 24 was not limited to the question whether the Court could grant an ex parte order enforcing the Board's subpena. Counsel for the Board, Mr. Pappy, addressed his oral argument -- as he had addressed the memorandum filed in support of the application -- to both the merits of the application and the procedure used in seeking a court order (Tr. 3-8). The sum and substance of Mr. Pappy's argument was that, under established law, a proceeding to enforce a Board subpena did not require "the issuance of process, hearing, findings of fact, or the elaborate process of a civil suit" (Tr. 7), and that the "manifestly meritorious nature of the Board's case /as shown by the application, exhibits attached thereto and supporting memorandum/, in the absence of any substantial or cognizable issues of fact /in the subpena enforcement proceeding/, warrant summary enforcement of the subpena" (Tr. 8).[4/]

4/ In this connection, during the course of his argument, Mr. Pappy stated: "However, there is another issue in this case, and the reason we are here today. The question is, shall the principal

(footnote con't)

It is true that Company counsel, Mr. Spalding, limited his argument to the Court's alleged lack of jurisdiction over Harvey and the failure of the proceeding to comply with the Federal Rules because there had been

4/ (footnote con't)

case be delayed even further by what we consider would be an unnecessary hearing on the merits of this proceeding" (Tr. 7). At the later hearing on the Board's motion to clarify the record on appeal, counsel for Harvey construed the foregoing statement as posing the question whether the subpena could be enforced by ex parte order (Tr. 25-27). That interpretation is incorrect. Since the Company was in court and being heard, it was obviouly too late to argue over whether the order could issue ex parte. Rather, Mr. Pappy was saying only that the issue before the court was whether Harvey could raise any matter by way of defense which would warrant a hearing before the subpena could be enforced. It was his contention, of course, that the Company had no meritorious defenses against the relief sought, and that no further hearing was warranted.

no complaint filed, no service of process, and no opportunity for the Company to file a formal answer. In thus limiting its response, however, and by disregarding the merits of the Board's application, the Company waived the right to assert any other defenses if the Court ruled against it on the jurisdictional point. For Chief Judge Clarke had repeatedly advised the parties that he would take the case as submitted upon the conclusion of this hearing and the receipt of a memorandum from the Company and a reply thereto from the Board. See R. 91; Tr. 8-9, 11, 12. Twice during the course of the hearing, the Chief Judge invited the Company to "reply" to the Board's memorandum, and to state "anything . . . orally now in addition to what you are to state in written form" with regard to the application (Tr. 10, 11). Simply put, the Court was asking the Company to show cause why the subpena should not be enforced. Each time, however, counsel for the Company limited his response to a challenge to the jurisdiction of the Court despite an assurance from Chief Judge Clarke that the filing of a reply to the Board's memo would not constitute a waiver of the jurisdictional issue (Tr. 10, 11-12).

Not until it filed its memorandum on November 3, 1966 (R. 92-107), did the Company give any indication that it desired to assert any defenses on the merits of the Board's application for subpena enforcement. Even then, the defenses were not actually asserted, but merely alluded to. The Company described in ambiguous, conclusory terms to "positions" it "will" assert "if permitted to be heard, and upon being brought within the Court's

jurisdiction. . . ." (R. 106).[5/] The Company, however, had already been "permitted to be heard," but had raised no defense except that it had not been "brought within the Court's jurisdiction." Since, at the hearing, the District Court had invited Company counsel to say anything he wanted to because the case would be taken as submitted when the Company's memorandum and the Board's reply memorandum were filed, the Company cannot now be heard to complain because the Court decided the application on the basis of the record thus made. The Company was not precluded from raising any defenses to the merits of the Board's application; it simply wilfully failed to take advantage of the opportunities to do so.

5/ The defenses described in the Company's memorandum had been raised before the Trial Examiner and the Board when the Company had unsuccessfully moved to revoke the subpena, and were before the Court--along with counsel for the General Counsel's responses thereto--as exhibits to the Board's application. See R. 16-90. The application and attached exhibits contained the charge and all the pleadings in the unfair labor practice case, as well as the subpena and all the motions, appeals, memoranda and rulings in the administrative proceeding relating thereto. The relevance and materiality of the documents subpenaed, and the question whether the subpena was unduly burdensome, could thus be determined from the facts established by the Board's application itself.

B. The procedure followed by the District Court complied with the requirements of due process, and the order directing Harvey Aluminum to comply with the subpena is valid and should be affirmed

In the preceding section of this brief, we have shown that the Company was served with a copy of the Board's pleading, knew of the allegations against it, and was afforded an opportunity to answer those allegations and to be heard thereon. Harvey claims, however, that the procedure employed was improper under the Federal Rules of Civil Procedure, and that the order resulting therefrom was therefore void. The Company rests its argument on Rule 81(a)(3), F.R. Civ. P., which states, in relevant part:

> "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."

It is the Company's contention that no deviation from the Federal Rules in a Board subpena enforcement proceeding is "otherwise provided by statute," and that the District Court never entered an order suspending the applicability of any of the rules.

We submit that appellant's arguments are without merit: the National Labor Relations Act does provide a special procedure for Board

subpena enforcement proceedings in the district courts; and in any event, the court below properly exercised its power under Rule 81(a)(3), F.R. Civ. P., to proceed differently than the Federal Rules require. Before discussing these issues, however, we believe it necessary to consider the context in which administrative subpena enforcement proceedings arise.

1. The need for summary subpena enforcement proceedings

The need for a summary proceeding for enforcement of administrative subpenas has long been recognized. "The importance of promptness as well as adequacy in administrative investigation (necessarily involving prompt and efficient use of the subpena power) both of statutory violations and of the general administration of legislation . . . is an indispensable condition of the effective enforcement of remedial social legislation. . . ." Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 216 (C.A. 2), aff'd 317 U.S. 501. To make effective the subpena powers given by Congress to the administrative agencies, the courts have consistently barred review at the subpena enforcement stage of issues litigable on appeal from the final agency order. Oklahoma Press v. Walling, 327 U.S. 186, 208-209; Endicott Johnson Corp. v. Perkins, supra, 317 U.S. at 508-509. In order not to preclude or unduly delay the agency from making a determination which was entrusted to it by Congress in the first instance, the courts will not require that the agency show that there exists probable cause to believe that the statute has been violated or that the coverage of the statute extends to the violation in question before enforcing the

subpena. Oklahoma Press, supra; Endicott Johnson, supra; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49; F.T.C. v. Crafts, 355 U.S. 9, rev'g per curiam, 244 F. 2d 882 (C.A. 9); U.S. v. Morton Salt, 338 U.S. 632, 652; U.S. v. Powell, 379 U.S. 48, 57-58. See, also, C.A.B. v. Hermann, 353 U.S. 322, rev'g per curiam, 237 F. 2d 359 (C.A. 9). As stated by the Supreme Court, ". . . it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208." U.S. v. Morton Salt, supra, 338 U.S. at 652-653. See, also, Chapman v. Maren Elwood College, 225 F. 2d 230, 231 (C.A. 9); F.C.C. v. Schreiber, 329 F. 2d 517, 520 (C.A. 9), modified on other grounds, 382 U.S. 279.

These general rules are specifically applicable to Board proceedings. The "scope of permissible judicial inquiry in deciding whether such an application [for subpena enforcement] should be granted or denied . . . is extremely limited." N.L.R.B. v. C.C.C. Associates, Inc., 306 F. 2d 534, 538 (C.A. 2). Duly issued subpenas are entitled to enforcement subject only to the requirements that the Board is acting within its statutory authority in a general class of proceeding that it is empowered to conduct, that the subpenas are not unreasonably burdensome, and that the information sought is not plainly incompetent

or irrelevant to any lawful purpose.[6/] Given the limited nature of the issues litigable in a subpena enforcement proceeding, and given the fact that frequently the Board proceeding cannot be concluded until the information sought is obtained, the appropriateness of a summary proceeding to enforce a Board proceeding is readily apparent. As we now show, Section 11(2) of the Act provides for just such a summary procedure.

2. The Act provides a special procedure for Board subpena enforcement proceedings in the district courts

Section 11(2) of the National Labor Relations Act, under which this proceeding was instituted, provides:

> "In case of contumacy or refusal to obey a subpena issued to any person [by the Board], any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring

6/ See Hamilton v. N.L.R.B., 177 F. 2d 676, 677 (C.A. 9); N.L.R.B. v. C.C.C. Associates, 306 F. 2d 534, 538 (C.A. 2); N.L.R.B. v. Friedman, 352 F. 2d 545, 547 (C.A. 3); Link v. N.L.R.B., 330 F. 2d 437, 440 (C.A. 4); Cudahy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694 (C.A. 10); N.L.R.B. v. United Aircraft, 200 F. Supp. 48, 50-51 (D. Conn.), aff'd per curiam, 300 F. 2d 442 (C.A. 2); N.L.R.B. v. Gunaca, 135 F. Supp. 790, 795-796 (E.D. Wisc.), aff'd, 230 F. 2d 542 (C.A. 7), vacated as moot, 353 U.S. 902.

such person to appear before the Board, its members, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. . . ."

The leading case construing this provision of the Act is Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F. 2d 450 (C.A. 6, 1941), affirming 36 F. Supp. 413 (D.C. Ohio, 1940). There, as here, the Board had initiated the proceeding by filing an application for subpena enforcement which alleged facts showing the circumstances in which the subpenas were issued, the relevance of the material subpenaed to the matter under investigation, and the circumstances surrounding the refusal of the persons subpenaed to comply. Pursuant to the prayer of the Board in its application, an order to show cause was issued immediately by the district court directing the respondents to answer the application and file whatever affidavits and briefs they desired within 6 days, and giving the Board 5 days more to reply. The order further provided that the application and order to show cause be served on each of the respondents, and that the case would be decided on the papers--with or without a hearing, at the discretion of the court--2 days after the Board had filed its reply. No summons was issued or served. Within the time allowed, the respondents--like appellant here--moved to dismiss or quash the proceeding because of lack of jurisdiction over the persons of the respondents in that there was insufficiency of service of process. In addition, respondents there also moved to dismiss for failure of the application to state a claim upon which relief could be granted, and they

filed an answer raising defenses on the merits of the application. 7/

The District Court decided the case on the papers and without a hearing. Rejecting the respondents' attack on the procedure followed, the Court enforced the Board's subpenas. On appeal by the respondents, the Sixth Circuit affirmed, stating (122 F. 2d at 451):

> ". . . We agree with the District Court that the proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the District Court is controlled by §11 (2) of the Act. . . .

7/ The foregoing facts are based upon the record filed with the Sixth Circuit in that case, and are set out in slightly less detail in the District Court's decision (36 F. Supp. 413). The procedure used in Goodyear is substantially the same as the procedure which the Board customarily uses today. In N.L.R.B. v. British Auto Parts, 266 F. Supp. 368 (C.D. Cal.), the Board used the procedure prescribed by the Federal Rules because the Board was asking for injunctive relief as an alternative to subpena enforcement. Admittedly, the procedure used in the case at bar deviated from the Board's usual practice in that no written order to show cause issued (although one was requested in the alternative), and service of the application and notice of the hearing was accomplished in a less formal manner. As we have already shown, however, these deviations did not prejudice the company in any way, for it did actually receive notice of the hearing and a copy of the application, and it was given ample time to file a written response--4 days before the hearing, and 10 days thereafter.

"It is significant that the statute calls for an 'application' rather than a petition, for an 'order' rather than for a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incident in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of the Congress, and that this clearly was indicated by the use of the simple and unambiguous words with which it described this proceeding."

See, also, Cudahy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694 (C.A. 10), affirming 34 F. Supp. 53, 60 (D.C. Kans.).

When Congress was considering the Taft-Hartley amendments of 1947, it was presumptively aware of Goodyear and Cudahy Packing, and of the procedures used by the Board and the courts in subpena enforcement proceedings. By reenacting Section 11(2) without change, Congress gave strong evidence of its approval of these procedures, and of the judicial construction placed upon that section of the Act. Shapiro v. United States, 335 U.S. 1, 16. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 58 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 58 (1947). Accordingly, Section 11(2) must be read as providing a summary procedure apart from the Federal Rules for securing enforcement of Board subpenas in the district courts. The procedure used in the case at bar complied with the procedure contemplated by Section 11(2), and the

Constitutional requirement of due process was satisfied. The proceeding was therefore proper and is immune from attack as an unwarranted departure from Rule 81(a)(3).[8/]

8/ The foregoing conclusion is confirmed by Kennedy v. Rubin, 254 F. Supp. 190 (N.D. Ill., E.D.), which the Company relies on in its brief, pp. 15-16. In that case, the court held that a petition to enforce an administrative summons issued by the Internal Revenue Service was governed by the Federal Rules, and that the respondent was entitled to invoke the discovery machinery therein provided. The court rejected the Government's claim that Sections 7402(b) and 7604(a) of the Internal Revenue Code (see n. 10 , infra) provide a special summary procedure within the contemplation of the first proviso to Rule 81(a)(3), and the Company cites the case as being analogous to the one at bar. The Company apparently overlooks the fact that in rejecting the Government's argument, the court distinguished Goodyear Tire & Rubber Co. v. N.L.R.B., supra, on the ground that Section 11(2) of the National Labor Relations Act is substantially different from the relevant sections of the Internal Revenue Code. The court said (254 F. Supp. at 192-193):

> "While petitioner relies heavily on Goodyear Tire and Rubber Co., . . . it must be noted that said case . . . was founded upon the language in the statute there at issue calling for an 'application' rather than a 'petition,' and an 'order' rather than a 'judgment.' * * * Section 7604(a), under which this action is brought, unlike the

(Continued)

3. In any event, the deviations from the procedures prescribed in the Federal Rules were insubstantial and non-prejudicial, and they constituted a reasonable exercise of the Court's discretion under Rule 81(a)(3)

Even assuming that Section 11(2) of the Act does not establish a special procedure to secure enforcement of Board subpenas, we submit that the procedure employed in this case, while begun less formally than the Board usually begins such cases, was basically a fair proceeding which the Court authorized pursuant to its powers under the third proviso

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8/ (Continued)
statute before the Court in Goodyear, and Section 7604(b), dealing with contempt proceedings before the commissioner, speaks of 'appropriate process.' While petitioner urges that Section 7604(b) must be read in pari materia with Section 7604(a), and thus, that the latter is governed by the reasoning in Goodyear, we cannot agree. There exists a very real distinction between Section 7604(b) actions which are in the nature of contempt proceedings against persons who 'wholly made default or contumaciously refused to comply,' . . . and actions brought merely to enforce an Internal Revenue Summons. * * * By petitioner's own reasoning, a distinction between 'application' and 'appropriate process' must be drawn, and we must assume that Congress intended that its chosen words would be given meaning."

in the last sentence in Rule 81(a)(3).[9/]

This sentence, added to Rule 81(a)(3) in 1946, was not intended to alter the procedure to be followed in court enforcement of Board subpenas. It was "largely a clarifying amendment which (1) makes the Rules generally applicable to proceedings for enforcement of administrative subpenas in line with case law and (2) clearly makes appeals in such proceedings subject to the Federal Rules." 7 Moore's Federal Practice, p. 4411 (2d ed., 1966). The draftsmen of the amendment made clear by the citation of case law that the major purpose of the amendment was to settle that subpena enforcement proceedings were civil suits which resulted in final orders appealable as of right under the then newly simplified provisions of Rule 73 of the Federal Rules. See, Notes of Advisory Committee on Amendments to Rules, Rule 81, subdivision a(3) (7 Moore's Federal Practice, supra, p. 4413); Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 226-227 (C.A. 2), aff'd 317 U.S. 501;

9/ The sentence has already been set forth in full, but we will repeat it here for the sake of convenience. The sentence reads: "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."

Walling v. News Printing, Inc., 148 F. 2d 57 (C.A. 3), aff'd sub nomine, Oklahoma Press Co. v. Walling, 327 U.S. 186.

That the amendment was intended to preserve the summary court procedure developed for enforcement of administrative subpenas of agencies like the Board is apparent both from the wording of the Rule and the Advisory Committee note. The section of the new sentence relating to proceedings in the district court was drafted to permit flexibility in the application of the rules by providing that they applied "except as otherwise provided by statute or by rules of the district court or by order of court in the proceedings." In contrast to part (2) of the new sentence, which made the rules applicable without exception to appeals, the three exceptions in part (1) were "drawn so as to permit application of the rules in the proceedings whenever the district court deemed them helpful." Notes of the Advisory Committee on Amendments to the Rules, Rule 81(a)(3) (7 Moore's Federal Practice, supra).

The Advisory Committee, noting the danger that "the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired," cited as the case law upon which this part of the amendment rested, the Goodyear, Cudahy, Endicott Johnson, and Oklahoma Press cases discussed above. As noted, both Goodyear and Cudahy specifically reject the contention that the Federal Rules apply to Board subpena enforcement proceedings, and approve the use of a

summary proceeding initiated by the Board's application.[10]

The Advisory Committee also cited with approval Martin v. Chandis Securities Co., 128 F. 2d 731 (C.A. 9), a case upon which Harvey very heavily relies. Rather than supporting the Company's position, Chandis actually supports the Board's. There, it was held that in construing an application for enforcement of a summons issued by an Internal Revenue agent under what is now 26 U.S.C. Sec. 7604(a),[11] it

10/ In both Oklahoma Press and Endicott Johnson, the actions were also initiated by applications for orders to show cause. In Oklahoma Press, the procedure was approved without discussion by the Circuit Court. 148 F. 2d 57 (C.A. 3). In Endicott Johnson, the subpena enforcement proceeding was begun by both complaint and application for order to show cause. The district court stated that the use of an application for order to show cause would have been sufficient. 37 F. Supp. 604, 604-605 (N.D. N.Y.). The Circuit Court stated that the Federal Rules applied to the appeal, but cited Goodyear with approval for the proposition that the Federal Rules did not apply to the proceedings in the district court. 128 F. 2d 208, 227 (C.A. 2). Moreover, in Cudahy v. Holland, 315 U.S. 357, another leading case on administrative subpenas, the Supreme Court approved the use of a summary proceeding initiated by an application for order to show cause, although reversing enforcement of the subpena on other grounds.

11/ This section states: "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, (Continued)

would be treated as a "complaint" under the Federal Rules because "the Internal Revenue Code contains no provision specifying the procedure to be followed in invoking the jurisdiction of the court below" (id., at 734). The Court thereupon applied Rules 8(a) and 15(b), F.R. Civ. P., to determine whether the application stated a claim warranting the relief requested.

Contrary to the Company's claim, however, nothing in Chandis can be construed as holding that the procedural requirements of Rules 4 and 12(a), F.R. Civ. P. (dealing with issuance and service of process, and time to answer) be complied with in proceedings to enforce administrative subpenas or summonses. For, in Chandis, this Court accepted, without hint of disapproval, a district court proceeding which began with the petition for, and issuance of, an ex parte order enforcing the summons issued by the Internal Revenue agent, and which came to issue when the person summoned subsequently moved to quash the order for various reasons. See 128 F. 2d at 732, 733, affirming 33 F. Supp. 478, 479-480 (S.D. Cal.). The same procedure was used, and accepted by this Court, in the later case of Chapman v. Goodman, 219 F. 2d 802, 804-805, 806

11/ (Continued)
records or other data, the United States district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

(C.A. 9). Accord: In re Wolrich, 84 F. Supp. 481, 482 (S.D. N.Y.); In re Albert Lindley Lee Mem. Hosp., 115 F. Supp. 643, 645 (N.D. N.Y.), aff'd 209 F. 2d 122 (C.A. 2), cert. denied sub nom., Cincotta v. U.S., 347 U.S. 960. Indeed, since, as this Court held in Chapman, the Government could initiate a subpena enforcement proceeding by means of an ex parte order which the person subpenaed could then attack by filing a motion to quash, then the procedure used in the case at bar is proper a fortiori. For here, the order enforcing the subpena was not issued ex parte, but only after the Company had been served with a copy of the application and had been given an opportunity to oppose the granting of the application, both orally and in writing.

Chapman also serves to rebut Harvey's claim that the court below never issued an order modifying the application of Rule 81(a)(3). There, as here, no order was issued which, in terms, announced that the procedures to be used in the enforcement proceeding would be modified. Rather, the district court in Chapman merely signed the ex parte order compelling the production of certain documents, and when, after service of the order, the person subpenaed filed his answer, cross-claim, motion to join indispensable parties and motion to quash the ex parte order, the district court then entertained and ruled upon the various pleadings. The district court denied the motions and struck the answer and cross-claim. On appeal, this Court construed the ex parte order enforcing the subpena as "laying aside the Rules of Civil Procedure and proceeding as to Rule 81(a)(3) under 'except as otherwise provided by statute or by rules of the district court or by order of the court in the proceeding.' (Emphasis supplied.)" (219 F. 2d at 806). So here, the action of

Chief Judge Clarke in setting the Board's application for hearing on October 24, and there giving the Company 10 days in which to file a written response to the application with the warning that the case would then be taken as submitted, constituted an "order of the court in the proceeding" modifying the application of the Federal Rules to the case. That the Company elected to rest its defense on the sole ground that it had not been served with process and had not been given 20 days in which to respond, does not militate against the propriety of the procedure the District Court followed, or the validity of the order resulting therefrom.

Equally unavailing is the Company's reliance on United States v. Powell, 379 U.S. 48, another case arising under 26 U.S.C. Sec. 7604(a). There, the Court held that a showing of probable cause to believe the taxpayer had committed fraud was not a prerequisite to enforcement by a district court of a summons issued by the Internal Revenue Service. The Court explained that the substantive standards for judicial enforcement of an administrative summons under the applicable provision of the Internal Revenue Code are analogous to the "requirements in like circumstances involving other agencies" (id., at 57, citing Oklahoma Press v. Walling, supra). The Court went on to say, however, that the limited scope of litigable issues in the enforcement proceeding "does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered" (id., at 58). While going on to set forth some of the defenses a taxpayer could raise, the Court appended the following footnote:

"Because §7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co., 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under §7604(b) might be made simultaneously with the filing of the complaint."

This dictum does not mean, as the Company claims, that there must be compliance with all the terms of the Federal Rules, including the issuance and service of process, and the requirement that the party subpenaed have 20 days in which to answer the request for enforcement. Rather, the Court was trying to make clear the fact that a taxpayer would have an opportunity to be heard and to raise any cognizable defenses before he could be compelled to comply with the summons. The foregoing interpretation is confirmed by the Court's reference to Martin v. Chandis Securities, discussed supra--a case which, we have shown, is concerned with procedural fairness, not procedural technicalities. See also, McGarry's, Inc. v. Rose, 344 F. 2d 416 (C.A. 1). There, a district court enforced five Internal Revenue summonses in a proceeding begun by the filing of petitions to enforce and the issuance of orders to show cause. On appeal, the persons summoned challenged the procedure used as not

being in conformity with the Federal Rules, as required by Powell. The First Circuit rejected the claim, saying (344 F. 2d at 418):

> "A reading of the opinion in United States v. Powell, supra, leaves no doubt that the thrust thereof is to insure that a taxpayer obtain an adversary-type hearing in the district court prior to his being forced to comply with an administrative summons which he challenges in good faith. That the procedure followed in the instant case fully complies with the essential requirements of the Powell decision appears so clearly from the record herein as to preclude any need for further discussion of appellants' contentions with reference thereto."

Other courts have also reached the conclusion that Rule 81(a)(3), as amended, does not require that administrative subpena enforcement proceedings be initiated by the time-consuming process of complaint, issuance and service of process, and answer. In approving the use of an order to show cause to commence such a proceeding under Section 29 of the Shipping Act (46 U.S.C. 828)--a section similar to Section 11(2) of the NLRA--the courts have emphasized that it would unduly frustrate and delay the proceedings to require "the lengthy complaint and answer procedure." Federal Maritime Commission v. Transoceanic Terminal, 252 F. Supp. 743, 745-746 (N.D. Ill.). See also, Federal Maritime Commission v. New York Terminal Conference, 262 F. Supp. 225, 230 (S.D. N.Y.), aff'd 373 F. 2d 424 (C.A. 2); Federal Maritime Commission v. DeSmedt, 366 F. 2d 464, 466

(C.A. 2), cert. denied, 385 U.S. 974. Under a provision of the Federal Trade Commission Act virtually identical to the one at bar (15 U.S.C. 49), the same reasoning has also led to a holding that the substantial delay involved in a full plenary hearing militates against the conclusion that Congress intended to require adherence to all the procedural requirements of the Federal Rules. United States v. Associated Merchandising Corp., 256 F. Supp. 318 (S.D. N.Y.); Federal Trade Commission v. Green, 252 F. Supp. 153 (S.D. N.Y.).

Finally, even in those cases cited by the Company in which the court stated that Rule 81(a)(3) required the agency in question to comply with the Federal Rules, it is clear that the court did not consider this to mean that the proceedings must be initiated as an ordinary civil suit is begun. Thus, in Shasta Minerals & Chemicals v. S.E.C., 328 F. 2d 285 (C.A. 10), the court specifically approved the district court's use of Rule 81(a)(3) as allowing commencement of a subpena enforcement proceeding by an order to show cause, followed by summary judgment under the Federal Rules. Similarly, in Long Beach Federal Savings and Loan Association v. Home Loan Bank Board, 189 F. Supp. 589, 596 (S.D. Cal.), though stating that the Federal Rules were to apply through Rule 81(a)(3) to subpena enforcement proceedings, the court again approved the use of an order to show cause to commence the proceeding. Indeed, appellant's citation of these cases exposes the basic weakness of its position before this Court. For, contrary to the Company's claim, the Board does not take the position that the Company had no right to present defenses to the District Court. Rather, the Board contends that Harvey Aluminum was afforded

precisely that opportunity, as required by the cases, and that appellant simply refused to present any evidence in support of its refusal to comply. Accordingly, the subpena was properly enforced.

CONCLUSION

For the reasons stated, it is respectfully requested that the appeal should be denied, and that the court's order be affirmed.

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February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD LAMSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 21973

Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

FILED

NOV 13 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD LANNOM, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 21973

Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging appellant guilty of both counts of a two-count indictment (set out verbatim in Appendix A), charging a violation of Title 21, U.S.C., §176(a) (Clerk's Transcript, pp. 2, 44; Reporter's Transcript, p. 227). References to the Clerk's Transcript hereinafter will be designated C.T., and references to the Reporter's Transcript hereinafter will be designated R.T.

Judgment was imposed on February 27, 1967, whereby appellant was committed to the custody of the Attorney General for a period of 8 years on counts One and Two, said

sentences to run concurrently (C.T., p. 45). On the same date, a timely Notice of Appeal was filed (C.T., p. 45-A).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., §3231. This Court has jurisdiction to entertain the instant appeal from the judgment under Sections 1291 and 1294, Title 28, U.S.C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against appellant by the grand jury for the United States District Court, Southern District of California, which indictment was filed November 9, 1966 (C.T., pp.2-3; Appendix A). The indictment was in two counts. Count One charged appellant and his wife with aiding and abetting the importation of approximately 198 pounds of marijuana. Count Two charged them with aiding and abetting the transportation and concealment of approximately 198 pounds of marijuana. Both charges were alleged to have been in violation of Title 21, U.S.C., §176(a), and Title 18, U.S.C., §2. Upon arraignment, appellant and Mrs. Lannom entered pleas of not guilty to both counts. Thereafter, a Motion for Severance and Separate Trial of the two defendants was granted (C.T., p. 29; R.T., p. 11). The following day trial of appellant was commenced before the Honorable Fred Kunzel on January 24, 1967 (R.T., p. 29), which trial resulted in a

finding of guilty as to appellant on both counts (C.T., p. 44; R.T., p. 227).

Counsel for appellant moved the Court to enter a judgment of acquittal as to both counts, which motions were denied (R.T., pp. 182, 228). In argument on these motions, counsel for appellant at trial urged that the evidence adduced by the government depended entirely on the testimony of an accomplice (R.T., pp. 169-182). In addition to urging this ground as a basis for a judgment of acquittal, instructions were proposed by the defense which, in effect, requested that the jury be advised that appellant could not be convicted on the uncorroborated testimony of an accomplice (C.T., pp. 33-40; R.T., pp. 185-188). These requested instructions are set out verbatim in Appendices C-1 through C-8.

The defense also requested an instruction to the effect that a witness available to the prosecution to maintain its burden of proof, which witness the prosecution does not produce, is presumed one who would testify against the government (R.T., pp. 198-199; C.T., p. 32; Appendix B). In support of this requested instruction, evidence was offered that persons who actually accompanied Mougey to Tijuana, and one of these persons (an ex-wife) who was actually in the car at the time Mougey imported the marijuana, were available during the course of the trial but had not been called by the United States Attorney (R.T., pp. 202-205).

III.

SPECIFICATION OF ERRORS

1. Prejudicial error resulted from the trial court's refusal to give a requested instruction that failure of the prosecution to call witnesses available to maintain its burden of proof gave rise to a presumption that these witnesses would testify against the government.

2. Appellant was prejudiced by the trial court's failure to give requested instructions that he could not be convicted on the uncorroborated testimony of an accomplice.

IV.

STATEMENT OF FACTS

William Mougey testified that in April, 1966, he was introduced to appellant, who was identified as Don the Barber (R.T., p. 34). On April 8, Mougey, Ed Herreras, appellant, appellant's wife, and another girl, travelled from Los Angeles to Tijuana (R.T., pp. 39-40). On the trip from Los Angeles, appellant received a speeding citation, which was confirmed by the citing officer (R.T., pp. 41, 123). After arriving in Tijuana, Mougey stated that appellant departed and subsequently re-met the group, at which time he, Mougey, was taken to a side street in Tijuana where a vehicle was pointed out (R.T., p. 41). This vehicle was a 1957 Chevrolet which Mougey subsequently drove to the Los Angeles area, accompanied by a girl companion who had come down with the group from Los Angeles (R.T., pp. 41-42). After returning to the Los Angeles

area, the party spent the night at appellant's home (R.T., p. 42). There is some discrepancy in Mougey's testimony as to who spent the night and the order of departure, but Mougey stated that he eventually received $500.00 for driving the vehicle, which sums were shared with Ed Herreras and the girl who accompanied him although he was uncertain as to the method of payment to him and his payment to Herreras and the girl companion (R.T., pp. 41-42, 58-60). In any event, Mougey stated that he expressed a desire to make additional trips and purportedly initiated further contact with appellant (R.T., pp. 41-42). There was no showing that any marijuana was involved in the first trip (R.T., p. 87).

According to Mougey, the events which immediately preceded his arrest commenced with his visiting a bar in Van Nuys, California, known as Pappy's, where he proceeded to drink a sufficient amount that he attributed convenient lack of recollection at trial to alcoholic intake (R.T., pp. 85-86). Mougey was purportedly to meet Ed Herreras but this individual failed to come to the bar where Mougey was drinking (R.T., pp. 44, 105). Mougey therefore made calls to appellant which the witness states culminated in his being given instructions to return to Tijuana and pick up the same car he had driven from Tijuana on April 8 (R.T., pp. 44, 86). Despite his purported alcoholic stupor, Mougey testified that he was able to enlist the aid of a sister and brother-in-law, John and Erica Burnham, and an ex-wife (Kathy), to whom he owed

support (R.T., pp. 86-89). After some shuffling of vehicles and children, including Mougey's driving despite a convenient alcoholic blackout of details, the group, consisting of Mougey, his wife, his sister and brother-in-law departed for Tijuana, the brother-in-law, John Burnham, driving a vehicle belonging to the ex-Mrs. Mougey's current husband (R.T., pp. 88-92).

After arriving in Tijuana, the group proceeded directly to a motel near the Caliente racetrack where Mougey entered the vehicle he had driven to Los Angeles on a previous occasion, and the group departed (R.T., pp. 44, 101-102). After stopping to clean the windshield, Mougey asked his ex-wife to accompany him in the Chevrolet and she consented (R.T., p. 103). Gas was purchased in Tijuana and Mougey drove to the border, followed by Burnham in the Oldsmobile (R.T., pp. 103-104). Upon arrival at the border, the 1957 Chevrolet was searched by customs officers and approximately 198 pounds of marijuana removed therefrom (R.T., pp. 125-129, 154). The Burnhams, although immediately behind Mougey and his ex-wife, were apparently not stopped (R.T., pp. 52, 54). The government's witness admitted giving the customs officers a fictitious story and in fact took them to the Los Angeles area where the car was purportedly to be picked up (R.T., pp. 95-96).

After being arrested, Mougey was released on bail, the premium for which, according to bondswoman Juana Martinez Goldstein, had been in part supplied by appellant (R.T., p.149). Mougey stated that after being released on bail, he contacted appellant and requested a meeting at a bar known as the Sir Knight (R.T., pp. 47-50). According to Mougey, this meeting culminated in his being beaten up by appellant and other persons, although a Los Angeles police officer, who saw Mougey almost immediately after the purported beating, failed to notice any evidence of physical abuse (R.T., pp. 48-50, 98, 143-145).

Mougey and his wife were indicted for a charge involving the 198 pounds of marijuana, and were subsequently charged in another indictment, along with John and Erica Burnham, with a violation of the Federal law in connection with 198 pounds of marijuana alleged to have occurred on April 22, 1966 (R.T., pp. 51, 203).

The government produced two witnesses, Lynn Drake and Glen Stewart, who testified that appellant was present when the 1957 Chevrolet had been purchased in the Los Angeles area (R.T., pp. 115-119, 162-168). Although the record established that John Burnham, Erica Burnham and the ex-Mrs. Mougey were present during the initial stages of the trial, nevertheless the government did not offer these persons as witnesses (R.T., pp. 54-55, 198-203, 205).

V.

ARGUMENT

A. PREJUDICIAL ERROR RESULTED FROM THE TRIAL COURT'S REFUSAL TO GIVE A REQUESTED INSTRUCTION THAT FAILURE OF THE PROSECUTION TO CALL WITNESSES AVAILABLE TO MAINTAIN ITS BURDEN OF PROOF GAVE RISE TO A PRESUMPTION THAT THESE WITNESSES WOULD TESTIFY AGAINST THE GOVERNMENT.

The instruction which counsel for appellant at trial proposed is set out verbatim in Appendix B hereto, and can be found on page 32 of the Clerk's Transcript. As noted in the very requested instruction itself, the proposed language was an exact quote from the opinion of this Court in Yaw v. United States, 228 F.2d 382 (9th Cir. 1958). This doctrine, of course, is not one which was originated by this Court, nor is it a doctrine which dates only to 1958. In fact as early as 1893, the Supreme Court of the United States recognized the principle:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."
>
> Graves v. United States, 150 U.S. 118, 121 (1893).

See also: Scanlon v. United States, 223 F.2d 382, 391-2 (1st Cir. 1955) in connection with a prosecutor's comment on defendant's failure to produce witnesses.

United States v. Jackson, 257 F.2d 41, 43-44 (3rd Cir. 1958) concerning a court's refusal to allow

counsel for an accused to comment on the government's failure to produce material witnesses.

It should be noted that in the instant case, the witnesses to whom reference is herein made were not simply strangers who observed portions of the transaction culminating in Mougey's arrest at the border. All of those persons who were present at the initial stages of the trial, as the record demonstrates, were actual participants who eventually were charged with the very offense of which appellant stands convicted. In fact, the ex-Mrs. Mougey was a passenger in the very vehicle containing the marijuana. Under these circumstances, therefore, it is submitted that a requested instruction as offered was entirely appropriate.

Compare: Bradford v. United States, 271 F.2d 58, at page 65 (9th Cir. 1959). The very point which the Court in the Bradford decision holds rendered the requested instruction on failure to produce witnesses inappropriate is not applicable to the instant case. As noted in the Bradford opinion, the witness to which reference was made was not present at any occasion when narcotics were transferred, purchased, et cetera. In contrast to that situation, the instant case demonstrates that the ex- Mrs. Mougey and John Burnham were the sina quo non so far as Mougey being able to get to the vehicle containing the marijuana. It is submitted, therefore, that appellant was absolutely entitled to the requested instruction so far as these witnesses are concerned.

B. APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO GIVE REQUESTED INSTRUCTIONS THAT HE COULD NOT BE CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellant is not unmindful of this Court's opinion in Cheadle v. United States, 370 F.2d 314 (9th Cir., Dec.27,1966) decided a short time prior to commencement of the trial from which appeal is herein sought. That opinion, of course, reiterated a rule adhered to in this Circuit for a substantial period of time to the effect that a conviction may be predicated solely on the uncorroborated testimony of an accomplice.

See also: Quiles v. United States, 344 F.2d 490, 494 (9th Cir. 1965), and Doherty v. United States, 230 F.2d 605 (9th Cir. 1965), explicitly holding that the California rule concerning corroboration was not applicable.

Appellant respectfully requests that the Court re-evaluate the rules previously announced in connection with testimony of accomplices. The dangers inherent in the rule as it presently exists are obvious. (See: Ramirez v. United States, 363 F.2d 33, 34 [9th Cir. 1966]). The instant appeal actually puts into bold relief the inappropriateness of allowing the guilt or innocence of another individual to depend entirely on evidence of a coparticipant. Not only was William Mougey's future at stake but obviously that of his ex-wife and Mr. and Mrs. Burnham. The future security of not only the witness Mougey but three persons very close to him certainly depended on his placing primary responsibility for

the marijuana importing on someone else.

In these circumstances, therefore, it is submitted that the trier of fact should be instructed that evidence independent of such an interested party's testimony must point toward knowing participation by the defendant. If this be true, then defense requested instructions numbers 2 through 9 should have been given, and the failure to so give constituted prejudicial error.

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VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction of appellant must be reversed.

Respectfully submitted:

SHEELA, O'LAUGHLIN, HUGHES & CASTRO

By _____
Peter J. Hughes
Attorney for Appellant

CERTIFICATE

I, Peter J. Hughes, certify, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Peter J. Hughes

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SEPTEMBER, 1966-GRAND JURY

UNITED STATES OF AMERICA, Plaintiff, v. DONALD LANNOM, MRS. DONALD LANNOM, Defendants.	No. 37503 -SD I N D I C T M E N T (U.S.C., Title 21, Section 176a Smuggling and concealing marihuana; U.S.C., Title 18, Section 2 - Aiding and abetting)

The Grand Jury charges:

COUNT ONE
(U.S.C., Title 21, Section 176a; U.S.C. Title 18,Sec.2

On or about April 22, 1966, in San Diego County, which was then within the Southern Division of the Southern District of California, as previously ascertained by law, WILLIAM ROY MOUGEY and KATHERINE MOUGEY, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 198 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485; and defendants

DONALD LANNOM and MRS. DONALD LANNOM knowingly aided, abetted, counseled, induced and procured the commission of the aforesaid offense.

COUNT TWO

(U.S.C., Title 21, Sec. 187a)
(U.S.C., Title 18, Section 2)

On or about April 22, 1966, in San Diego County, which was then within the Southern Division of the Southern District of California as previously ascertained by law, WILLIAM ROY MOUGEY and KATHERINE MOUGEY, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately 198 pounds of marihuana, which marihuana had been imported and brought into the United States contrary to law; and defendants DONALD LANNOM and MRS. DONALD LANNOM knowingly aided, abetted, counseled, induced and procured the commission of the aforesaid offense.

A TRUE BILL

_____
Foreman

_____
EDWIN L. MILLER, Jr.
United States Attorney

APPENDIX B

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

"A witness available to the prosecution to maintain its burden which it does not produce or explain why it cannot, is presumed one who would testify against the Government." (Exact quote.)

Yaw v. United States, 228 F.2d 382 (9th Cir.1958).

REQUESTED BY PETER J. HUGHES
ATTORNEY FOR DEFENDANT

APPENDIX C-1

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

It is the law that the testimony of an accomplice ought to be viewed with distrust.

It is specifically requested that the foregoing instruction be given in lieu and in place of CALJIC 829.

APPENDIX C-2

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

(Exact quote of first paragraph CALJIC 821.)

APPENDIX C-3

DEFENDANT'S REQUESTED INSTRUCTION NO. 4

Such corroborating evidence must not only connect him with the crime with which he is charged, but it must do so without aid or direction from the testimony of the accomplice (or accomplices) whose testimony is to be corroborated.

APPENDIX C-4

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the

evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence then his testimony is corroborated. But before you may convict the defendant you must find from all the evidence that it carries the convincing force required by law.

CALJIC 822 (1962 Revision).

APPENDIX C-5

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

There can be no question that it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime, but evidence independent of the testimony of the accomplice must tend to connect a defendant with the crime itself, and not simply with its perpetrators. It is not with the person who commits the offense that the connection must be had but with the commission of the crime itself.

APPENDIX C-6

DEFENDANT'S REQUESTED INSTRUCTION NO. 7

Association with a criminal is not to be equated with connection with the crime so far as the requirement of independent evidence tending to connect defendant with the commission of an offense, as required by the accomplice corroboration rule.

> " ' "It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it..." ' "

People v. Robinson, 61 A.C. 413, 439.

APPENDIX C-7

DEFENDANT'S REQUESTED INSTRUCTION NO. 8

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. To render a person an accomplice,he, in some manner, knowingly and with criminal intent must have aided, advised, encouraged or participated in the commission of the criminal act charged.

APPENDIX C-8

DEFENDANT'S REQUESTED INSTRUCTION NO. 9

Under the definition of an accomplice I instruct you that as a matter of law the witness, William Mougey, is an accomplice, and the rules applicable to an accomplice must be applied to his testimony.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss

Arlene V. Ledbetter, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 1101 U. S. Grant Hotel, San Diego, California; that she is over the age of eighteen years, and not a party to the within action.

That on November 4, 1967, she deposited in the United States mail, San Diego, California, in the within action, No. 21973 - DONALD LANNOM v. UNITED STATES OF AMERICA, in an envelope bearing the requisite postage, a (3) copy of

APPELLANT'S OPENING BRIEF

addressed to:

Edwin L. Miller, Jr.
United States Attorney
Southern District of California
332 United States Courthouse
325 West "F" Street
San Diego, California 92101

at which place there is a delivery service by United States mails from said post office.

Arlene V. Ledbetter

SUBSCRIBED and SWORN to before me this 4th day of November, 1967.

Notary Public in and for said State and County

NO. 21973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ONALD LANNON,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

FILED
DEC 5 1967
WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 21973

IN THE UNITED STATES COURT OF APPEALS

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
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NO. 21973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD LANNON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that William Roy Mougey and Katherine Mougey, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States approximately 198 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported said marihuana contrary to law, and also charged that appellant and Mrs. Donald Lannon knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].[1/]

Count Two alleged that William Roy Mougey and Katherine Mougey, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 198 pounds of marihuana, which marihuana had been imported into the United States contrary to law, and also charged that appellant and Mrs. Donald Lannon knowingly aided, abetted, counseled, induced, and procured the commission of that offense. [C.T. 3].

Jury trial of appellant commenced on January 24, 1967, before United States District Judge Fred Kunzel [R.T. 31-32].[2/] Appellant was found guilty as charged upon each count on January 26, 1967 [C.T. 44].

1/ "C.T." refers to the Clerk's Transcript.

2/ "R.T." refers to the Reporter's Transcript of Appeal.

Thereafter, on February 27, 1967, appellant was committed to the custody of the Attorney General for eight years upon each count, to run concurrently and also to run concurrently with the sentence in another case [C.T. 45]. Appellant filed a timely notice of appeal [C.T. 45-a].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. Prejudicial error resulted from the trial court's refusal to give a requested instruction that failure of the prosecution to call witnesses available to maintain its burden of proof gave rise to a presumption that these witnesses would testify against the government.

"2. Appellant was prejudiced by the trial court's failure to give requested instructions that he could not be convicted on the uncorroborated testimony of an accomplice."

[Appellant's Opening Brief, p. 4].

IV

STATEMENT OF THE FACTS

On April 8, 1966, appellant took a trip to Tijuana, Mexico, in his own vehicle, accompanied by William Mougey, Ed Herreras, Mrs. Lannon, and a girl named Jackie. Lannon was known to Mougey as "Donald the Barber." [R.T. 34, 40, 57, 154].

The vehicle was stopped in San Diego by a San Diego Police motorcycle officer, who had observed appellant driving in a southerly direction at

a speed of 67 miles per hour. The group subsequently proceeded to Tijuana, where appellant separated from Herreras, Mougey, and Jackie. He later rejoined them, drove them to a side street, and said, "This is the car you are to drive back." Mougey and Jackie drove the car back to appellant's apartment, and appellant paid Mougey $500 [R.T. 41, 122-23]. Mougey did not see any marihuana during the trip [R.T. 87].

On the following day, Mougey told appellant that "if he had any more trips, I would be glad to drive again; that it was an easy $500." [R.T. 41-42].

On approximately April 12, 1966, appellant asked Mougey whether he wanted to pick up another car. Mougey agreed to do so [R.T. 43]. On April 22, appellant told Mougey to go to Tijuana, pick up the car across the street from the Caliente racetrack, and cross the border before 11 o'clock. He said that it was the same car that Mougey drove on the last occasion, that it was parked in a motel across from the racetrack, that the key was in the ashtray, and that Mougey would be paid $500 [R.T. 44].

Mougey went to Tijuana, got the car, headed for Los Angeles, and was stopped at the border at San Ysidro, California, and arrested for smuggling [R.T. 44-45, 126]. The vehicle contained 90 packages located underneath the rear seat, in back of the rear seat, in panels, and in spot-welded compartments underneath the fenders. The compartments were of a type not normally found in an automobile [R.T. 127-28].

It was stipulated that the packages contained marihuana [R.T. 68-69, 129]. The marihuana weighed 198 pounds and had a selling price of

approximately $3256 to $3520 in Mexico [R.T. 154].[3/]

Under questioning by an officer, Mougey related a story that was inconsistent with his later testimony at trial [R.T. 53].

The vehicle in which the marihuana was found had been sold on March 31, 1966, to a man using the name of "Jim L. Wilson." "Wilson" furnished a false address [R.T. 117-18, 127, 161-62]. Appellant was present when the vehicle was purchased. When "Wilson" was asked questions in connection with the sales negotiations, "he would always look to the other gentleman" (appellant) before answering, "obviously for approval . . . ." Both men appeared to be nervous when tape recording of the negotiations commenced [R.T. 117-19].

Mougey's arrest occurred on a Friday night. On the following Monday, he was released on $10,000 bail. Appellant paid the necessary cash for Mougey's bail [R.T. 45-46].

On April 27, 1966, Mougey made arrangements to meet appellant at the Sir Knight cocktail lounge in Van Nuys, a suburb of Los Angeles [R.T. 47, 140]. Mougey arrived first and ordered a drink. While he was sitting at the bar, some other men came in, using the front door and the back door. They acted so strangely that the bartender and another employee decided to call the police [R.T. 48, 134-35].

3/ The witness testified that the approximate selling price was between $37 and $40 per kilo and that one kilo equalled 2-1/4 pounds [R.T. 154].

A police officer arrived and found appellant, Mougey, "John Herrera," and Jerry Lynn in a vehicle at the rear of the cocktail lounge. In the meantime, Mougey had left the inside of the lounge at Jerry Lynn's request and walked to the vehicle, where he was beaten by appellant, Ed Herreras, and Lynn. Appellant accused Mougey of turning him in to the police and said that he would kill Mougey. He mentioned that there were some shovels in the trunk. Lynn said that if they could not get to Mougey, that he had a three-year old daughter. Appellant said that he would leave it up to Herreras as to whether Mougey lived or died. Herreras said to let him go. Then the police officer arrived [R.T. 48-50, 140-41].

The officer noticed no bruises, but he did not examine Mougey's body. Mougey appeared to be "upset or nervous about something." Appellant told the officer that his name was "Donald James Barber." [R.T. 141-42, 144-45].

V

ARGUMENT

A. REFUSAL TO GIVE AN INSTRUCTION REGARDING FAILURE TO CALL WITNESSES DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Court should have given an instruction to the effect that failure of the prosecution to call available witnesses "to maintain its burden of proof" results in a presumption that the witnesses would testify against the prosecution (Appellant's Opening Brief, p. 4).

Appellant refers to John Burnham, Mrs. Burnham, and Katherine Mougey,

all of whom were present during portions of the trial [R.T. 204-05].

The rule proposed by appellant does not apply where the witnesses are equally available to both parties.

Wagner v. United States, 264 F.2d 524, 531 (9th Cir. 1959), cert. denied, 360 U. S. 936 (1959);

Arellanes v. United States, 302 F.2d 603, 608 (9th Cir. 1962), cert. denied, 371 U. S. 930 (1962).

Manual on Jury Instruction in Federal Criminal Cases, 33 F.R.D. 602 (citing numerous decisions).

> "Where a witness is equally available to both parties no inference should be drawn from the failure to produce such a witness."

Wagner, supra, at p. 531.

Since the witnesses in question were present in the courtroom during portions of the trial, no inference should be drawn from the failure by either party to call them as witnesses.

In Bradford v. United States, 271 F.2d 58, 65 (9th Cir. 1959), this Court noted that there are many objections that could be leveled at a proposed instruction to the effect that failure to call a witness gives rise to an inference that the testimony would be unfavorable. Although the various objections are not listed in the opinion, some may be readily discerned. A witness may not be called because his testimony is saved for rebuttal purposes; because he is hostile; because he intends to commit perjury; because he is subject to

impeachment; because he intends to rely upon the privilege against self-incrimination or other privilege; because he is mentally unstable; because his testimony may tend to reveal the identity of a confidential informant whose life may be imperiled; because he claims lack of memory; because it would cost hundreds of dollars to transport him to the scene of trial; or for many other valid reasons. The rule proposed by appellant would be more likely to accomplish injustice than justice.

Appellant cites Yaw v. United States, 228 F. 2d 382 (9th Cir. 1955), which contains dictum stating a rule that has been modified by the later decisions in Wagner and Arellanes, supra.

Furthermore, in Yaw, the Court emphasized the fact that the testimony by the witness could not incriminate him, since ha had plead guilty (at p. 383). In the instant case, the possible witnesses in question had been indicated in connection with the same crime that was the subject of the trial [R.T. 203], and there is no evidence that their testimony would not have tended to incriminate themselves. 4/

4/ It also might be noted that the Yaw dictum refers to a "presumption" and cites, as sole authority, Wigmore On Evidence, Sections 286-90. In Wigmore's discussion of the subject, he refers to an "inference," not a presumption.

Wigmore on Evidence, 3rd Ed., Vol. 2, Sections 286-90. However, appellant requested an instruction to the effect that a presumption was created [C.T. 32].

Appellant also cites Graves v. United States, 150 U. S. 118 (1893); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); and United States v. Jackson, 257 F.2d 41 (3rd Cir. 1958). Graves and Scanlon refer to witnesses whose availability is "peculiarly" within the power of one party.

Graves, supra, at p. 121;

Scanlon, supra, at p. 392.

In the instant case, the witnesses were available to both parties, not peculiarly available to only one party.

Jackson, supra, indicates (at p. 44) that where the potential witness is equally available to both parties, failure to produce is open to an inference against both parties. Under this view, each side might be entitled to an "inference" instruction (although appellant requested more by employing the "presumption" term), so failure to give these counter-balancing instructions would not result in prejudice to appellant.

B. ERROR WAS NOT COMMITTED BY FAILURE TO INSTRUCT THE JURY THAT UNCORROBORATED TESTIMONY OF AN ACCOMPLICE WOULD BE INSUFFICIENT TO CONVICT.

Appellant argues that the trial Court should have instructed the jury that the uncorroborated testimony of an accomplice would be insufficient to sustain a conviction.

However, the uncorroborated testimony of an accomplice is sufficient to sustain a conviction.

Caminetti v. United States, 242 U. S.470, 495 (1917);

Grant v. United States, 371 F.2d 400, 401 (9th Cir. 1967);

Cheadle v. United States, 370 F.2d 314, 315 (9th Cir. 1966);

Torres v. United States, 353 F.2d 734, 735 (9th Cir. 1965);

Quiles v. United States, 344 F.2d 490, 494 (9th Cir. 1965), cert. denied, 382 U.S. 992 (1966);

Ellis v. United States, 321 F.2d 931, 933 (9th Cir. 1963);

Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963);

Proffit v. United States, 316 F.2d 705, 707 (9th Cir. 1963);

White v. United States, 315 F.2d 113, 115 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963);

Bible v. United States, 314 F.2d 106, 108 (9th Cir. 1963), cert. denied, 375 U. S. 862 (1963);

Williams v. United States, 308 F.2d 664, 666 (9th Cir. 1962);

Toles v. United States, 308 F.2d 590, 592 (9th Cir. 1962), cert. denied, 375 U. S. 836 (1963);

Marcella v. United States, 285 F.2d 322, 323-24 (9th Cir. 1960), cert. denied, 366 U. S. 911 (1961);

Ambrose v. United States, 280 F.2d 766, 768, n. 8 (9th Cir. 1960);

Audett v. United States, 265 F.2d 837, 846-48 (9th Cir. 1959), cert. denied, 361 U. S. 815 (1959);

Cowell v. United States, 259 F.2d 660, 661 (9th Cir. 1958);

Doherty v. United States, 230 F.2d 605 (9th Cir. 1956);

Catrino v. United States, 176 F.2d 884, 889 (9th Cir. 1949);

Todorow v. United States, 173 F.2d 439, 444 (9th Cir. 1949), cert. denied, 337 U. S. 925 (1949);

Pina v. United States, 165 F.2d 890, 892 (9th Cir. 1948);

Westenrider v. United States, 134 F.2d 772, 774 (9th Cir. 1943);

Hass v. United States, 31 F. 2d 13, 14 (9th Cir. 1929), cert. denied, 279 U. S. 865 (1929).

Furthermore, the testimony of the accomplice was corroborated by many other witnesses. The accomplice testified that appellant exercised dominion over the vehicle that was involved in the smuggling [R.T. 41, 44]. Lynn Drake and Glen Stewart testified concerning appellant's participation in the purchase of the same vehicle, which was purchased under the name of "Jim L. Wilson" with a false address, only 8 days before appellant told the accomplice to drive the vehicle for the first trip. At the time of the purchase of the vehicle, the ostensible purchaser, "Wilson," was always looking at appellant, obviously for approval, before answering questions. Appellant and "Wilson" both appeared to be nervous when tape recording of the sales negotiations commenced [R.T. 41-42, 57, 115-18, 125-27, 161-65]. Some of the smuggling compartments were spot-welded underneath the fenders of the vehicle.

The accomplice, Mougey, testified that a speeding ticket was received during the April 8 trip to Tijuana with appellant driving a 1966 Ford. This testimony was corroborated by Officer Quidley, who testified that he gave

appellant a speeding ticket on April 8 in San Diego. Appellant was driving a 1966 Ford southbound at high speed [R.T. 40-41, 122-24].

Mougey testified that appellant was known to him as "Donald the Barber." Officer Williams testified that appellant told him that his name was "Donald James Barber." [R.T. 34, 139-41].

Mougey testified that appellant paid the money for Mougey's bail. This testimony was corroborated by the testimony of the bail bond agent, Juana Martinez Goldstein [R.T. 46, 146-50].

Mougey's account of the beating in Van Nuys was partially corroborated by the testimony of Judith Hopkins and Officer Williams. Miss Hopkins testified that the acquaintances of Mougey entered the cocktail lounge through the front door and rear door, acting so strangely that she and the bartender decided to call the police. Officer Williams testified that Mougey appeared to be upset or nervous and that the persons in the vehicle were appellant, Mougey, Jerry Lynn, and "John Herrera" (Mougey testified that he was beaten on that occasion by appellant, Jerry Lynn, and Ed Herreras) [R.T. 47-48, 133-37, 140-43].

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

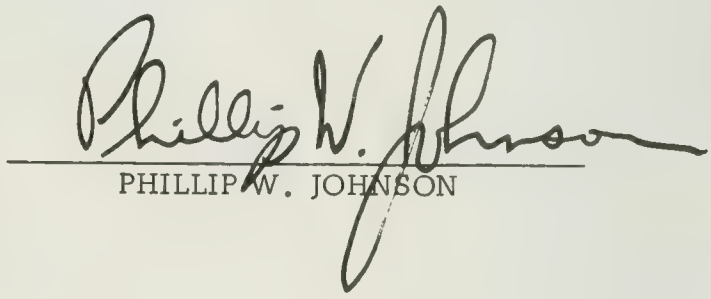
EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON

No. 21,977

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES F. ARMSTRONG,
Plaintiff-Appellant,

vs.

ALEC W. BROWN and LESTER J. GENDRON, et al.,
Defendants-Appellees.

BRIEF OF APPELLEES

ROY E. WOLFE,
County Counsel of the County of Madera,
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Madera, California 93637,
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No. 21,977

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JAMES F. ARMSTRONG,
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vs.

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Defendants-Appellees.

BRIEF OF APPELLEES

JURISDICTIONAL STATEMENT

Appellant invokes Federal Jurisdiction under 28 U.S.C.A., Section 1343 (3-4), R.S. #1979 (1875) and 42 U.S.C.A., Section 1983 (1958). Nowhere in his complaint or brief is there any citation of authority for the proposition that a convicted felon has a "constitutional right" to file criminal complaints against a Justice Court Judge and District Attorney for alleged acts occurring after Appellant was incarcerated in the State Prison and his judgment of conviction had become final. (Appellant's Opening Brief, page 5, lines 9-13.)

Although couched in the language of due process and equal protection, there is no substantial factual issue alleged involving jurisdiction of the federal courts.

Appellees assert that the complaint is not a sufficient statement of facts to invoke federal jurisdiction.

STATEMENT OF THE CASE

For purposes of this brief, Appellees adopt the allegations of Appellant in his opening brief.

Appellees assert that stripped of the verbiage of deprivation of constitutional rights, due process and equal protection of the laws, Appellant's grievances are summarized as follows:

1. Appellees Alec Brown and Lester Gendron did not properly handle "criminal complaints" prepared by Appellant which accused certain judicial officers of alleged crimes.

SPECIFICATION OF ERRORS

Appellant contends it was error to dismiss his complaints and asserts numerous theories in support of his complaint as stating a claim under which relief might be granted.

ARGUMENT

Appellant was convicted in the California State Courts in 1953 and the judgment became final since no appeal was taken or perfected. (Appellant's Opening Brief, page 1, lines 22-23.)

Nine years later, while serving his sentence in the State prison, Appellant sought to have the Clerk of Madera County and the Deputy Clerk prosecuted for crimes alleged to have been committed by said Clerk and Deputy. Appellant is dissatisfied with the disposition of said matters and asserts that such disposition somehow deprived him of his constitutional rights. Appellees ask "What right does a prisoner have to compel criminal prosecutions of a County Clerk and a Deputy County Clerk because Appellant is displeased with their actions or inactions." As was pointed out in *Blackman v. Wagner,* 6 Cir., 235 F. 2d 11,

> "The district court was not in error in dismissing the complaint. Certain of the defendants were immune from liability. *Kenny v. Fox,* 6 Cir., 232 F. 2d 288. As to others, the jury's verdict in the State criminal trial resolved any conceivable issues against Appellant. *Thompson v. Heither,* 6 Cir., 235 F. 2d 176. Rule 12, Fed. R. Civ. Procedure, 28 U.S.C.A."

Appellees assert that in addition to the rule of the *Blackman v. Wagner* (supra) rationale, the complaint does not state any claim upon which relief can be granted for the following reasons:

1. "No cause of action is stated under the Civil Rights Act where plaintiff was convicted of

armed robbery and it did not appear that he had applied to the State Supreme Court for leave to appeal from the judgment of conviction, since he had not exhausted his State court remedies." *Crawford v. Lydick,* D. C. Michigan, 179 F. Supp. 211, Affirmed 280 F. 2d 426.

2. "Judges are absolutely privileged as respects civil suits to recover damages for action taken by them in the exercise of their judicial functions and this is an absolute defense to actions brought under Civil Rights Act. *John v. Gibson,* C.A. Cal. 270 F. 2d, 36. This absolute defense is available in actions brought under the Civil Rights Act even if the confinement complained of may have been in violation of constitutional rights." *John v. Gibson,* supra; *Dunn v. Gazzola,* 1 Cir. 216 F. 2d 709; *Francis v. Crafts,* 1 Cir. 203 F. 2d 809, 811; *Gregoire v. Biddle,* 2 Cir. 177 F. 2d 579; *Tenny v. Brandhove,* 341 U. S. 367; *Francis v. Lyman,* 1 Cir. 216 F. 2d 583, 588; *Agnew v. Moody* (9 Cir. 1964) 330 F. 2d 868, Cert. den. 379 U. S. 867.

Appellees contend further that these numerous actions and appeals are without factual foundation to invoke federal jurisdiction and the consistent use of semantics in attempts to bring Appellant's claims under the Civil Rights Act are of such nature that the court can and should dismiss the appeal as frivolous, if the complaint was held to possibly state a claim under such Act. The authority to so dismiss is found in *Jiminez v. Barber,* 9 Cir., 252 F. 2d 550 set out as follows: "A court of appeals may in the exercise of its plenary power dismiss a civil appeal as

frivolous." Appellee adopts the language of the U.S. District Court which is set forth in its Memorandum and Order, as follows:

> "Review of the entire file in this matter has convinced the court that this proceeding is utterly frivolous and malicious within the meaning of Title 28 U.S.C. Section 1915(d). Accordingly, the court adopts the suggestion made by the United States Court of Appeals for the Ninth Circuit in *Stiltner v. Rhay,* 322 F. 2d 314; and *Brown v. Brown,* 368 F. 2d 992, by dismissing Plaintiff's complaint (Compare: *Shobe v. California,* 362 F. 2d 545)."

CONCLUSION

The dismissal was proper and the appeal should be dismissed.

Dated, Madera, California,
August 24, 1967.

ROY E. WOLFE,
County Counsel of the County of Madera,
Attorney for Appellees.

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the rules of the U. S. Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

ROY E. WOLFE
County Counsel

I certify that in connection with the
examination of this paper I have consulted
Burton Jr., it and it is the value of the y.
8. Count of Appeals for the Ninth District,
and this is my opinion the Investigating Grand
Jr. in [Gulf Compliance with these rules.

STATE OF CALIFORNIA)
) SS.
COUNTY OF MADERA)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 209 West Yosemite Avenue, Madera, California. On the 11th day of September, 1967, I served the within Certificate on JAMES F. ARMSTRONG, Plaintiff-Appellant in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Madera, California, addressed as follows:

Mr. James F. Armstrong
Box #A-25062
Represa, California.

I certify and declare, under penalty of perjury, that the foregoing is true and correct.

Executed on September 11, 1967, at Madera, California.

DOROTHY L. FARRELL

STATE OF CALIFORNIA }
COUNTY OF MODERA } ss.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 307 Yosemite Avenue, Modera, California. On the 11th day of September,1917, I served the within Certificate on JAMES F. MONTGOMERY, Plaintiff-Appellee in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Modera, California, addressed as follows:

Mr. James F. Montgomery
Box 45-12345
Empress, California.

I certify and declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 1917, at Modera, California.

_____

No. 21979

United States Court of Appeals for the Ninth Circuit

- - - - -

Reuben G. Lenske,

Appellant

v.

F. M. Sercombe, Clerk of the Supreme Court of the State of Oregon; John H. Holloway, Secretary of Oregon State Bar; Lamar Tooze Jr., Attorney for Oregon State Bar; Wm. M. McAllister, Chief Justice, William C. Perry, Gordon Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Arno H. Denecke, Ralph M. Holman, Associate Justices, who comprise the Supreme Court of the State of Oregon; James G. Richmond, Philip Hayter, Carrell F. Bradley, John B. Fenner, Alfred F. Cunha, Wendell E. Gronso, Roy Kilpatrick, Herbert C. Hardy, John D. Ryan, Philip A. Levin, John E. Jaqua and Wallace A. Johansen, who comprise the Board of Governors of Oregon State Bar,

Appellees

****

BRIEF OF APPELLANT

****

Appeal from the United States District Court for the District

of Oregon

Hon. John F. Kilkenny

****

Reuben G. Lenske
1014 S.W. 2d Ave.,
Portland, Ore. 97204.
Appellant.

FILED

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JURISDICTION

The District Court had jurisdiction under Title 28 U.S.C. 1343(3) and this court has jurisdiction of the appeal under Title 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was convicted of indirect contempt in an original proceeding by the Supreme Court of the State of Oregon. See State et al v. Lenske, 243 Or. 477, 405 P. 2d 510, 407 P. 2d 250. He was fined $500 in the face of a statute of Oregon that limited the punishment for indirect contempt to $100. He filed Suit in U. S. District Court to restrain the enforcement of the State Court judgment alleging in his complaint that the order suspending him from practicing law, upon which the contempt order was based, was entered ex parte and without any notice of any kind and without a hearing of any kind and was therefore violative of his constitutional rights under the Fifth and Fourteenth amendments to the U. S. constitution. See paragraph V of the complaint in the appendix herein.

Appellant alleged that in being held guilty of contempt the court denied him the freedom of speech guaranteed him by the First Amendment to the U. S. constitution. See paragraph VIII of the complaint.

Appellant alleged that he was denied due process guaranteed by the Fifth and Fourteenth Amendments to the U. S. constitution in that the hearing was held before a prejudiced Referee and prejudiced judges, the prejudice having been shown in the manner generally accepted by the courts of the State of Oregon; in that there was a total absence of evidence of the suspension order itself or service

of intent or wilfulness; in that the suspension order, although not introduced in evidence, was void for the additional reason that there was no time limit to the order; in that appellant was denied the right to present argument before the court or a brief relating to the findings of the Referee; in that appellant was denied confrontation by the court at the trial or the hearing when evidence was adduced or at the time of sentencing; in that the court on its own motion permitted an amending affidavit to be filed in the nature of an indictment after the court itself found the initial affidavit to be insufficient; in that the court permitted discovery proceedings against appellant in a quasi-criminal trial. See paragraph IX of complaint in the appendix herein.

Appellant alleged in the complaint that the court denied him the rights guaranteed him by the Sixth Amendment to the U. S constitution in that it denied him a jury trial and in that it conducted the trial in a County and District other than where the crime was alleged to have been committed. See paragraphs X and XI of the complaint.

Appellant alleged that the assessment of a fine greater than that allowed by statute constituted a judicial Bill of Attainder and ex post facto law. See paragraph XII of the complaint.

Appellant alleged that he was threatened with imprisonment under a judgment entered in violation of the U. S. Constitution and that the courts of Oregon were prejudiced against him and that he had exhausted the procedural remedies afforded him by the State of Oregon. See paragraph XIII of the complaint. Besides being an appendix in this brief the complaint also appears on pages 1-4 of the Clerk's Record herein.

SPECIFICATION OF ERROR I.

The trial court erred in granting summary judgment and in dismissing my suit.

a. The court erred in holding that paragraph V of my complaint (R 2) failed to allege a sufficient set of facts to show violation of that part of the Fourteenth Amendment to the U. S. Constitution which says:

> "nor shall any State deprive any person of life, liberty, or property without due process of law;"

Suspending a lawyer ex parte without notice and without a hearing is depriving a person of property without due process.

b. To deny a citizen the right to make a legitimate inquiry of a state employee is a violation of the First Amendment to the U. S. constitution, which says:

> "Congress shall make no law ...abridging the freedom of speech."

This applies to states in the Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Paragraph VIII (R 3) of my complaint is a sufficient allegation of my being deprived of that right.

c. Requiring a litigant to be tried by a prejudiced court, allowing discovery proceedings against him in a quasi-criminal proceeding, failing to adduce evidence of intent or wilfulness, denying a defendant to present argument or briefs, permitting the amendment of an affidavit in the nature of an indictment many months after it was held sufficient, refusal of the court to confront a defendant in a criminal prosecution at trial or at sentencing, failure to adduce evidence of a suspension order, the violation of which is the basis for criminal prosecution for contempt, severally and collectively constitute a violation of due

process protected by the Fourteenth Amendment above quoted. The allegations in paragraph IX (R 3) of plaintiff's complaint are by all normal standards sufficient to entitle appellant to a plenary trial.

d. Amendment VI of the U. S. constitution, which says:

> "In all criminal prosecutions, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, whic district shall have been previously ascertained by law..."

was violated in that appellant was denied a jury trial and in that he was tried in a different district than the one in which the alleged crime was committed, and the allegations in paragraphs X and XI sufficiently allege the violation by the Oregon Supreme Court, so that it was error for the U. S. District Court to dismiss the complaint.

e. Article I, Sec. 10 of the U. S. constitution provides that:

> "No state shall...pass any bill of attainder, ex post facto law..."

and Oregon Revised Statutes 33.020(1) provides:

> ". . . it must appear that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding $100."

and the trial court erred in dismissing the complaint in the face of paragraph XII (R 4).

f. The Fourteenth Amendment to the U. S. constitution provides that

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws"

and a reading of the complaint shows on its face that appellant was denied the equal protection of the laws.

MY DEPOSITION

The motion for summary judgment is based entirely on the pleadings, which really means my complaint, plus my deposition.

Tr page 27, line 14:

MR. CUTSFORTH: I only mention this for Mr. Lenske's clarification. We are not asserting anything that goes beyond the scope of the pleadings.

Tr page 28, line 3:

(THE COURT): But we are just going ahead on the pleading here now.

MR. CUTSFORTH: ... We are relying on the pleadings and Mr. Lenske's deposition.

WHAT IF THERE WERE NO CONVICTION?

Dep page 7, line 10:

MR. CUTSFORTH: ...If...you were suspended from the practice of law and there had been no criminal conviction, I think most people would concede that your suspension was without cause...

MR. CUTSFORTH: (Dep page 8, line 7) We are entitled to show any facts which support the propriety of the contempt proceedings, and we have to start with the initial fact of a conviction...

I believe that Mr. Cutsforth was right and that in order to obtain summary judgment or plenary judgment against me in this case it was incumbent upon the defendants in the case, appellees, to show that there was valid evidence adduced in the contempt case that I was convicted of a felony involving moral turpitude and that such conviction was a final and conclusive judgment. Appellees did not make such showing and I assert that they could not make such showing because there was no valid evidence adduced in the contempt case of conviction and because on August 28, 1967 this appellate court entered its judgment in case No. 19539 reversing the conviction that had been entered against me and which I appealed but as to which there was no evidence adduced in the contempt case.

MY DEPOSITION FORTIFIES MY COMPLAINT

Dep page 20, line 8:

Q (by MR. CUTSFORTH) You have also alleged in Paragraph IX of your complaint, sub part (c), that "it failed to produce evidence of the suspension order or service of notice of the suspension order." Whom are you referring to when you say "it?"
A The court.

Q The Oregon Supreme Court?
A Yes.

Q When you say it failed to produce the evidence, at what proceedi are you contending that evidence should have been presented or produc and was not?

A Well, it didn't at any proceeding...it didn't at any proceeding produce evidence of either the suspension order, notice of the suspens order, service of the notice of the suspension order.

Q (Dep page 21, line 21) You have alleged in sub part (f) that the Court...(line 25) That it denied you the right to present argument befo the Court or (page 22) brief relating to the findings of the referee. Wh is that contention based upon?

A Well, based upon the fact that after the referee submitted findin I requested an opportunity to present brief. I am not sure, but it seem to me I asked for an opportunity to file exceptions to the findings.

Q ...(line 9) Was there a request on your part that you be allowed to do something?

A Oh, yes; there was a definite request...(line 14) I do remember very distinctly asking in writing for an opportunity to have a hearing in objection to the findings of the referee or in reference to the (dep page 22) findings of the referee before the Supreme Court, to file brief and to have an oral hearing...

Q (dep page 26, line 4) In sub part (h) of Paragraph IX of your complaint you have alleged that the Court refused to confront plaintiff at trial or hearing when evidence was adduced or at sentencing. What are you referring to there specifically?

A The entire proceeding.

Q (line 12) My question is: Your contention here or your complaint here is based upon the fact that some or part of these proceedings were had outside the presence of the Supreme Court?

A Yes.

Q What particular proceeding are you contending---

A All of them.

A If a jury is not -- if I am not entitled to a jury trial, I am at least entitled to confrontation by the Court at all stages.

THE COURT'S OPINION

The lower court's opinion was rendered by an able and experienced trial lawyer and judge. But emotion in judging between discredited me and the confreres of that distinguished jurist must have affected his generally perspicacious observations. Else, why would he put upon the permanent records of the law of this land (R page 62, line 19) that I was disbarred from the practice of law? That this is not true and there is nothing in the record to that effect I am sure eminent counsel for Appellees will themselves affirmatively assert in their answering brief.

Judge Kilkenny says (R 66) that he shouldn't try "to second guess a highly respectable court." The law imposes the duty upon courts to judge with absolute fairness between the highly respected and those who are disrespected. Respect is not the criterion for judging, truth is. The truth is that I was not disbarred and that the great emphasis placed by Judge Kilkenny on disbarment proceedings in his opinion shows that emotion rather than his usual sound self permeated his opinion. There are times when a Federal District Court should not try to "second guess a highly respectable court." But it should never be a rubber stamp for "a highly respectable court."

In my complaint I attack on Federal constitutional grounds the legality of contempt conviction and punishment imposed upon me by the Oregon Supreme Court. Judge Kilkenny takes as conclusive everything that court said and fails to say anything about the constitutional questions I raised. Is it or is it not a violation of due process to suspend a lawyer without notice or hearing - no matter what the cause? Is that not taking property without due process? If and when under due process a suspension order

is proper, is it due process to issue a permanent suspension order without limit as to time and thereby circumvent the due process that the United States Supreme Court demands in disbarment proceedings?

Judge Kilkenny says (R 63, line 3) "Plaintiff continued to practice law." That is what the Oregon Supreme Court said I did. But I alleged (R 3, paragraph VIII) that my conviction for contempt was bas on my making a constitutionally protected inquiry under the First Amendment to the U. S. Constitution - an inquiry that any U. S. citize could legally make. I alleged that (R 3) the Supreme Court of Oregon refused to hear me out on that or any of the other issues. Yes, I belie that on constitutional issues the Federal District Court should second guess a State court but that it should never be a rubber stamp for a sta court. And second guessing in such instances is appropriate for anoth reason. The Oregon Supreme Court was acting both as accuser and tr court. Its own dignity was involved. It was not second guessing a tria court, it was itself erring as trial courts sometimes do. Perhaps it was emotionally judging between its highly respected self and my dis-respected self - not what due process demands at all times between all disputants, even when one of the disputants is a highly respected court

It may be noted that this is the same court that, without a dissenti opinion, saw no constitutional violation in a conviction for murder whe the bailif in charge of the jury stated to one of the jurors, "Oh that wick fellow, he is guilty." See Parker v. Gladden, Warden, 385 U.S. 363, Dec. 12, 1966. Highly respected courts can be blinded to constitutional due process. Mr. Parker was entitled to be confronted by the witness against him and I was entitled to be confronted by the court that sentence me.

MY MOTION FOR DEFAULT MEETS DISASTER

On September 26, 1966 I filed a motion for default against defendants (R who had not appeared and these were the justices of the Oregon Supreme Court and the Governors of the Oregon State Bar. At the same time I submitted interrogatories to the defendants (R 10) in which I asked them when they received notice of the suit, when and through whom they received copies of the complaint. Those defendants who had not appeared generally filed a special appearance in opposition to the motion for default (R 12) on October 6, 1966. The defendants who had appeared filed objections to the interrogatories (R 16). The case had been filed on June 29, 1966 so there was an interval of about three months between the filing and the motion for default. The interrogatories sought to ascertain when and how the defendants had seen and read the complaint. What I was seeking surely was obvious to defendants and to the court. Since I got no voluntary answers to the interrogatories by any of the defendants, when the motion for default came up for hearing I subpoenaed two of the defendants who had not filed a general appearance and on December 16, 1966 the named witnesses on the Subpoena, Hon. Wm. M. McAllister and Hon. Ralph M. Holman, appearing specially, filed a motion to quash service of the subpoenas.

On December 19, 1966 Judge Kilkenny said "...I am not going to use the processes of this Court to interfere with the normal and the usual proceedings of the Supreme Court of Oregon or any other court. So the motion to quash, without hearing from you at all, Mr. Lenske, is allowed. (Tr 1-B, lines 17-22) And on page 1-C, "THE COURT: No, I am not going to hear you on this subject..." Nothing was said about the fact that if the defendants, or at least the ones who had made a general appearance, had answered the interrogatories during the preceding almost 5 months the subpoenas would not have been necessary for me to prove my point.

On pages 3 and thereafter I was given pretty rough treatment su
as: (Tr 4, line 11)

"MR. LENSKE: Well, if it please the Court, may I just finish the sentence I started to ----

you

THE COURT: Oh, I have no doubt about/finishing anything you star Mr. Lenske. You go ahead and do it.

MR. LENSKE: I see.

THE COURT: And make your record on it.

MR LENSKE: (Tr 6, line 17) Well, Your Honor, I -- my motion for default is based upon the answers which I hope to elicit, Number 1 from the interrogatories, which they have refused to answer, or their personal testimony, which, not having gotten it from the interrogatori I had hoped to get from their personal testimony.

THE COURT: I am amazed at either your ignorance, Mr. Lenske, or your statements to the Court here. You have served interrogatorie on all of the other defendants, other than those who are appearing here is that correct?

MR. LENSKE: I have served them on counsel. I have directed the interrogatories to all the defendants.

THE COURT: Have you served them on the other defendants?

MR. LENSKE: Well, I -- in person, no. I ----

THE COURT: Mr. Lenske, you can't 'oh-oh, ah-ah- me.

MR. LENSKE: No.

THE COURT: All right. That settles it then. The Motion for Defau is denied...

MR. LENSKE: (Tr 12, line 19) ...I want to show through the inter- rogatories that each of the defendants has seen and had and held and wa given a copy of the complaint in my case, in this case, and has read th relating to it in the newspapers and was aware of these promptly after t filing of the suit. And I would like -- having established that as a fact through the interrogatories, or through other means if I had to use othe means, which I didn't want to try to use the other means, I would want ruling of the Court then, not on the theory but on the facts, whether tha is sufficient notice to require them to make an appearance in the case.

THE COURT: Oh, Mr. Lenske, please don't tell me that you hones believe that.

MR. LENSKE: Well, I am seeking such a ruling, Your Honor, base as I say, on the facts, not on merely my statement that each of these de

fendants some months ago was given a copy of the complaint, read a copy of the complaint, read about the lawsuit in the newspaper and was fully aware of it. And I would like a ruling of the Court then, rather than now, whether that is sufficient requirement for them to appear.

THE COURT: Well, I will rule on it now. It is not sufficient, and further, I doubt if there is one thousandth of one per cent of the lawyers in the State of Oregon who would think that it was, so if you just want a ruling, I will rule on that now. (Tr page 13)

MR. LENSKE: (Tr page 17, line 5) Well, I want to raise a question of law based upon a set of facts, Your Honor; and I think I should have the right to do that. I ----

THE COURT: Well, you don't have the right to raise a question of law unless under the law you have that right, and I am holding that you do not have that right.

THE COURT FRUSTRATES MY EFFORTS AT PROOF

MR. LENSKE: (Tr 22, line 4) I know the answers, Your Honor; but I want to prove that by the answer ----

THE COURT: If you know the answer ----

MR. LENSKE: I want to prove it by the answers of the defendants.

THE COURT: All right. Well, you can prove it yourself if you know them. After all, nobody has better knowledge on that than you have.

THE COURT: (Tr page 23, line 10) No, we have another proceeding here, Mr. Lenske. After all, these are interrogatories, as I understand it. We have another proceeding where you can ask for admissions, and und that, you might be able to secure this information...

MR. LENSKE: I am aware of both, and I am not aware of any reason for saying, "you may not have this, because you can do it another way.

THE COURT: ...This is a matter that you know just as much about as anyone else; and if you want admissions on it, you can secure admission under the usual and customary manner.

THE EQUAL PROTECTION OF THE LAWS

MR. LENSKE: (Tr 56, line 15) I had wondered, when the Court was so concerned about the formal service not having been made upon some of the defendants in the case, whether the Court would consider it equally a violation of due process or inadequate proceedings under my allegation in the complaint that there was no legal notice of the suspension served upon me. And I would say to your Honor that there is no conclusive presumption that one looks at different litigants equally, and the principle here is exactly identical, that seven jurists with the highest standing in

the state, which I attempted to show, had full knowledge ----

THE COURT: Oh, let's not get into that, Mr. Lenske...

The court did not wish to hear further about the applicability of the principle that knowledge or hearsay information about the existence of a court proceeding must be within our concept of due process. I agree with Judge Kilkenny when he says that not more than 1 out of a thousand lawyers in Oregon would consider reading about a lawsuit in the newspaper and receiving a copy of the complai from a fellow defendant as an adequate substitute for service of summons. By the same token not more than 1 out of 1000 Oregon lawyer would consider it due process and a basis to put a man in jail for him to read in the newspaper or get a copy of a letter to a third party by the clerk of the court that he may no longer earn a livelihood throu his chosen profession. In the law what is sauce for the goose is sauc for the gander. But is that always true in the application of the law?

THE BAR COMMITTEE'S RECOMMENDATION

The 1967 Oregon State Bar Committee on Disciplinary Rules and procedure made the following report and recommendation:

DISCUSSION OF RECOMMENDATIONS

At a meeting of the Committee held May 6, 1967, the question was raised as to whether attorneys convicted of crimes should be automatically suspended by the Oregon Supreme Court before the judgment of conviction has become final. After much discussion on the point, it was unanimously agreed that the Supreme Court should not have the power to automatically suspend an attorney convicted of a crime involving moral turpitude or of a felony, until such judgment of conviction has become final.

SELECTED SUPPORTING AUTHORITIES

Cameron et al. v. Johnson, Governor, et al.

381 U.S. 741, 749 (June 7, 1965)

Justice Black, in a dissenting opinion said:

Page 749: Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights.

Dombrowski v. Pfister

380 U.S. 479, 486 April 26, 1965

Opinion by Justice Brennan.

Page 486: A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.

upon the exercise of First Amendment rights may derive
Page 487: The chilling effect/from the fact of the prosecution, unaffected by the prospects of its success or failure.

Appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatene in this case.

Page 489: Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse.

It follows that the District Court erred in holding that the complaint fails to allege sufficient irr parable injury to justify equitable relief.

Schlesinger v. Musmanno

367 Pa. 476 81 A 2d 316, 319 (1951)

Page 319 (81 A 2d):

> ' "The privilege of serving as a juror (or as here, of an attorney practicing his profession) is one of the valuable rights * * *. Such rights may neither be extinguished abated or diminished by any proceeding short of one which fully comports with the historical and constitutional requisit of due process." '

In re Schlesinger

404 Pa. 584 172 A. 2d 835, 840, 841, 848 (1961)

172 A 2d 840:

> "In Schlesinger Petition, 1951, 367 Pa. 476, 481, 81 A. 2d 316 319, we had occasion to declare that the right to practice law is a right so valuable that it "'may neither be extinguished, abated nor dismissed by any proceeding short of one which fully comports with the historical and constitutional requisite of due process." '
>
> " In In re Murchison, 1955, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, the Supreme Court, in reversing two convictions for contempt of court, declared that "A fair trial in a fair tribunal is a basic requirement of due process.

172 A 2d 841:

> "Moreover, a predilection to favor one side over the other is no required in order to vitiate a judicial proceeding as being violat of due process. Merely, "a possible temptation to the average as a judge * * * not to hold the balance nice, clear, and true" is sufficient."

Page 848:

> "A disbarment proceeding is every bit as serious as a criminal trial and often far more so; the penalty of disbarment is certain harsher than a fine or short imprisonment."

A suspension without limitation amounts to the effect of receivin the punishment of disbarment without any of the safeguards provided fo disbarment proceedings.

Nathan Willner v. Committee...Div. of Supreme Ct. of N.Y.

373 U.S. 96 2 ALR3d 1254 May 13, 1963

Opinion by Mr. Justice Douglas

2 ALR 3d page 1260:

"The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Id. 270 U.S. p 123, 70 L ed at 497.

Page 1261:

"Those who are brought into contest with...Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." Morgan v. U.S. 304 US 1;

10 ALR 3d 727 - 794

Page 733:

Sec. 2. Summary and comment

While there were intimations and even holdings in the earlier cases that declaratory relief, like equitable relief generally, was inappropriate where the administration of the criminal law was involved, it now seems reasonably well settled that in and otherwise proper case declaratory relief may be granted notwithstanding the fact that the declaration is as to the validity or construction of a statute having criminal or penal provisions, and it seems clear, under the modern practice in most courts, that declaratory relief will not be denied merely because the petitioner by violating the statute or ordinance in question, could have the issue of his guilt tried out in a criminal prosecution.

In Bond v. Floyd et al., 385 U.S. 116 (Dec. 5, 1966) the court sai on page 126:

> "All three members of the District Court held that the court had jurisdiction to decide the constitutionality of the House action because Bond had asserted substantial First Amendment rights."

I alleged in my complaint that my inquiry was one that any citizen had a right to make and that it was protected by the First Amendment to the U. S. Constitution. The Oregon Supreme Court concluded that such inquiry by me was practicing law. See State v. Lenske, 243 Or 477, 489. Its action was very much like that of the State of Georgia in the Bond v. Floyd case in which the court said on page 132:

> "The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even th a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree."

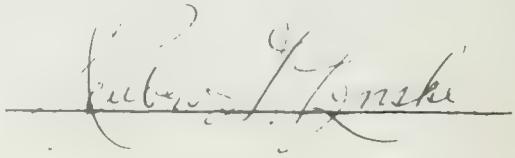
There is a direct analogy. If any citizen had the right to make the inquiry that I did then I, as a citizen, had that right. The first amendment protects everyone's right to make a simple inquiry from a state employee.

CONCLUSION

I believe that just reading my complaint should lead a fair minded person to the conclusion that it states a cause of suit on constitutional grounds. I belief that proof of my allegations will be easy.

Certificate

I certify that in connection with the preparation of this brief, I hav examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



APPENDIX

Following is the complaint that was filed in the U. S. District Court for the District Court on July 12, 1966 under Civ. No. 66-368. Plaintiff therein is appellant herein and defendants therein are the appellees herein.

I

Jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments to the United States Constitution and Title 42 United States Code, Sec. 1981-1988 and Title 28, Sec. 1343, and the orders and opinions against which this complaint is brought are reported in Oregon Advance Sheets, No. 7966 of September 9, 1965 and No. 8006 of November 3, 1965 and are by reference made a part of this complaint (243 Or 477).

II

That F. M. Sercombe is the Clerk and the seven persons hereinabove designated as such are the Justices of the Supreme Court of the State of Oregon.

III

That John H. Holloway is the Secretary and Lamar Tooze Jr. is the attorney in the matter hereinafter set forth and the nine persons hereinabove named are the Board of Governors of Oregon State Bar, which is a statutory creature of the State of Oregon.

IV

That at all times herein mentioned between 1925 and up to April 28, 1964 plaintiff was duly admitted to and was a practicing lawyer in the State of Oregon, with offices in Portland, Oregon.

V

That defendant Supreme Court of the State of Oregon, at the instance of defendant Oregon State Bar, acting through the individuals above named, acting ex parte and without any notice to plaintiff and without a hearing of any kind, caused an order to be entered in the records of said court suspending plaintiff from the practice of law in the State of Oregon and such ex parte order was entered in violation of plaintiff's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution.

VI

That notice of said order of suspension was not served upon plaintiff.

VII

That the Supreme Court of the State of Oregon, acting at the instance of Oregon State Bar, caused plaintiff to be cited in an original proceedings in the Supreme Court of the State of Oregon for indirect contempt for alleged violation of said suspension order, although said court had no such original jurisdiction.

VIII

That said court found plaintiff guilty of contempt for exercising his freedom of speech guaranteed him by the First Amendment to the U.S. Constitution when he made an inquiry of a State of Oregon employee which could be legally and appropriately made by any citizen of the United States.

IX

That said court denied plaintiff the right of due process guaranteed under the Fifth and Fourteenth Amendments to the U. S. Constitution i

a. It directed a hearing before a Referee prejudiced against plaintif and denied plaintiff the normal right of a citizen to cause a prejudiced Referee and prejudiced judges to be removed from consideration of his case when such prejudice was shown on the record in the manner gener ally followed in courts of the State of Oregon.

b. Although contempt proceedings in Oregon are quasi-criminal proceedings, it permitted discovery proceedings against plaintiff.

c. It failed to produce evidence of the suspension order or service of notice of the suspension order.

d. It failed to limit the suspension order timewise.

e. It failed to adduce evidence of intent or wilfulness.

f. It denied plaintiff the right to present argument before the court or a brief relating to the findings of the Referee.

g. It abused discretion by permitting an amendment to the initiating pleading in the nature of an indictment after trial before the referee and many months after plaintiff moved against the affidavit for insufficiency and many months after it had held the affidavit sufficient.

h. It refused to confront plaintiff at trial, or hearing when evidence was adduced or at sentencing.

X

Defendants denied plaintiff a jury trial guaranteed him both as a matter of due process and under the Sixth Amendment to the U. S. Constitution.

XI

It conducted the trial in a County and District other than where the alleged crime was alleged to have been committed, thereby violating the Sixth Amendment to the U. S. Constitution.

XII

The Supreme Court in effect issued a judicial Bill of Attainder and ex post facto law by assessing a fine greater than provided by Oregon statute, i.e., ORS 33.020, as punishment for the offense alleged.

XIII

Said acts of defendants are in violation of plaintiff's civil rights and the civil rights of all other persons within the classification of plaintiff and defendants have threatened and do now threaten to imprison plaintiff under an order entered in violation of the requirements of the laws and constitution of the United States of America and, unless restrained by this court will carry out such threat; that plaintiff has exhausted the procedural avenues of the State of Oregon to obtain relief from such threats, all to no avail and that defendants should be temporarily and permanently enjoined from issuing any process for the enforcement of said contempt order, and that because of the prejudice of defendants towards plaintiff and the other allegations herein plaintiff cannot obtain plain, speedy or adequate remedy at law in the Courts of Oregon.

Wherefore, plaintiff prays that the suspension and contempt orders of the Supreme Court of the State of Oregon against plaintiff be declared void and that defendants be restrained and enjoined from doing any act towards enforcing the same and that plaintiff be allowed his costs and disbursements incurred herein and granted such further relief as may be just and meet.

Reuben G. Lenske
Attorney pro se
1014 S.W. 2d Ave.,
Portland, Ore.

609

Reuben G. LENSKE, Plaintiff,

v.

F. M. SERCOMBE, Clerk of the Supreme Court of the State of Oregon et al., Defendants.

Civ. No. 66–368.

United States District Court
D. Oregon.
March 2, 1967.
Revised Supplemental Opinion
April 17, 1967.

On defendants' motions for summary judgment, the District Court, Kilkenny, J., held that the federal court had no

> shows not only the time spent in hours but also the nature of the crime charged, the disposition of the case, the manner in which the time was spent, the necessity therefor and any other facts which tend to demonstrate 'extraordinary circumstances.' Only then can the Presiding Justice properly perform the duty imposed upon him under the statute to review such allowances." People v. Perry, supra, 278 N.Y.S.2d at 331 (App.Div., 1967).

Note

The conviction upon which the suspension and contempt were based was reversed by the Circuit Court of Appeals for the Ninth Circuit by opinion first rendered on October 5, 1966 and finalized on August 28, 1967 in case No. 19539 entitled Reuben G. Lenske v. United States of America.

jurisdiction over suit by attorney who had been suspended from practice of law by state Supreme Court to enjoin the suspension.

Motions granted and cause dismissed.

1. Attorney and Client ⇐36(1)

Under Oregon law, the Supreme Court of Oregon has exclusive jurisdiction, under its common law and statutory powers, to suspend, disbar or reprimand members of the State Bar.

2. Attorney and Client ⇐56

Board of Governors of the State Bar has limited power to recommend to Supreme Court the suspension, disbarment or reprimand of a lawyer. ORS 9.480, 33.020.

3. Injunction ⇐22

Under Oregon law, where only Supreme Court had power to suspend attorney from practice of law, issuance of injunction against clerk of Supreme Court, Secretary of State Bar, attorney for State Bar and individual members of Board of Governors of State Bar to enjoin suspension of petitioner from practice of law would be futile act. ORS 9.480, 33.020.

4. Attorney and Client ⇐57

Federal District Court does not have jurisdiction to review state court order relating to disbarment of attorney.

5. Courts ⇐282.2(9)

Supreme Court of United States will review state court order disbarring attorney where attorney makes substantial allegation that disbarment proceedings violated disbarment process or equal protection clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

6. Courts ⇐282.2(9), 397½

Limits of review by federal court of state court action in disbarment proceedings are confined to violations of due process or equal protection clauses of the Fourteenth Amendment and petition for writ of certiorari to Supreme Court of the United States is exclusive method of review. U.S.C.A.Const. Amend. 14.

7. Courts ⇐303(7)

The federal court had no jurisdiction over suit by attorney who had been suspended from practice of law by state Supreme Court to enjoin the suspension.

Revised Supplemental Opinion

8. Courts ⇐303(7)

Immunity afforded states from suit in federal court was applicable to Supreme Court of Oregon and its individual members in suit by attorney to enjoin enforcement of order suspending him from practice of law.

9. Courts ⇐284

Civil Rights Act of 1871 did not authorize attorney to proceed against individual judges of the Oregon Supreme Court in his action to enjoin enforcement of Supreme Court order suspending him from practice of law. 42 U.S.C.A. § 1983.

Reuben G. Lenske, in pro. per.

Curtis W. Cutsforth, King, Miller, Anderson, Nash & Yerke, Portland, Or., Thomas H. Tongue, Hicks, Tongue, Dale & Strader, Portland, Or., for defendants.

OPINION AND JUDGMENT

KILKENNY, District Judge:

Plaintiff charges the defendants with denying him due process of law in contravention of the Fifth and the Fourteenth Amendments in disbarring him from the practice of law and in convicting him of contempt of court. The cause is before the Court on defendants' motions for summary judgments.

Plaintiff was admitted to the practice of law in Oregon in 1925, and until 1964 was a member of the Oregon State Bar. While a member of the Oregon State Bar, he was convicted in this Court of the Federal crime of "* * * wilfully and knowingly attempting to evade and defeat a large part of income tax due and owing * * *." The Oregon State Bar filed a certified copy of the judgment of conviction with the Supreme Court of Oregon, and that Court, pursu-

ant to Rule I of its rules for admission of attorneys,[1] summarily suspended plaintiff from the practice of law in Oregon. The Oregon State Bar was notified of this suspension by letter, a copy of which was sent to plaintiff. Plaintiff continued to practice law. Later, the Oregon State Bar, as relator, commenced an original contempt proceeding in the Oregon Supreme Court, as a result of which the plaintiff was found guilty of indirect contempt and fined $500.00.[2] Plaintiff then filed a petition for writ of certiorari with the United States Supreme Court on the ground that he had been denied due process. This petition was denied. Lenske v. Oregon ex rel. Oregon State Bar, 384 U.S. 943, 86 S.Ct. 1460, 16 L.Ed.2d 541 (1966). Likewise, a petition for rehearing and reconsideration of the petition for a writ was denied, 384 U.S. 1028, 86 S.Ct. 1920, 16 L. Ed.2d 1047 (1966).

Named as defendants are the individual members of the Supreme Court of Oregon, the Clerk of the Court, the Secretary of the Oregon State Bar, the attorney for the Oregon State Bar and the individual members of the Board of Governors of the State Bar. Plaintiff's contentions of lack of due process, by the Supreme Court of Oregon, are stated in the footnote.[3] Other incidental contentions include a charge that he was entitled to a jury trial, that he was entitled to a trial in the county or the district where the alleged crime was committed, and that the Supreme Court "in effect issued a judicial bill of attainder and *ex post facto* law" by assessing a fine greater than that provided by Oregon law.[4]

Most, if not all, of the allegations against defendants are conclusions of law, or recitals, rather than statements of fact. With reference to this type of pleading, we must keep in mind that the plaintiff is a lawyer of over forty years experience and is presumed to know the ground rules of pleading and practice. Certainly, he is presumed to know the distinction between a conclusion of law and a statement of fact and the difference between an allegation of fact and one that is merely a recital. Although this case might well be decided on the total insufficiency of the complaint, I shall, nevertheless, offer my conclusions on the controlling principles as I view them.

[1–3] The Supreme Court of Oregon has exclusive jurisdiction, under its common law and statutory powers, to suspend, disbar or reprimand members of the State Bar. ORS 9.480 grants to

1. "*Rule I. Suspension after conviction of crime.* Whenever it appears to the Supreme Court that any member of the bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Court may summarily suspend such member. * * *"

2. State ex rel. Oregon State Bar v. Lenske, Or., 405 P.2d 510 (1965), 407 P.2d 250 (1965).

3. "a. It directed a hearing before a Referee prejudiced against plaintiff and denied plaintiff the normal right of a citizen to cause a prejudiced Referee and prejudiced judges to be removed from consideration of his case when such prejudice was shown on the record in the manner generally followed in courts of the State of Oregon.

"b. Although contempt proceedings in Oregon are quasi-criminal proceedings, it permitted discovery proceedings against plaintiff.

"c. It failed to produce evidence of the suspension order or service of notice of the suspension order.

"d. It failed to limit the suspension order timewise.

"e. It failed to adduce evidence of intent or wilfulness.

"f. It denied plaintiff the right to present argument before the court or a brief relating to the findings of the Referee.

"g. It abused discretion by permitting an amendment to the initiating affidavit which is the initiating pleading in the nature of an indictment after trial before the referee and many months after plaintiff moved against the affidavit for insufficiency and many months after it had held the affidavit sufficient.

"h. It refused to confront plaintiff at trial, or hearing when evidence was adduced or at sentencing."

4. ORS 33.020.

the members of the Board of Governors the limited power to recommend to the Supreme Court the suspension, disbarment or reprimand of a lawyer. Obviously, an injunction against the defendants, other than the members of the Supreme Court, would be a futile act. Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966), cert. denied Nov. 22, 1966, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305. Consequently, I conclude that plaintiff is entitled to no relief, injunctive or otherwise, against defendants other than the Supreme Court of Oregon and the members thereof.

[4, 5] Turning now to the relief, if any, available to plaintiff against the members of the State Supreme Court, it is generally held that the lower federal courts do not have jurisdiction to review state court orders with reference to the disbarment of attorneys. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585 (1917); In re MacNeil, 266 F.2d 167 (1st Cir. 1959), cert. denied MacNeil v. Julian, 361 U.S. 861, 80 S.Ct. 120, 4 L.Ed.2d 103 (1959); In re Noell, 93 F.2d 5 (8th Cir. 1937); In re Bennethum, 196 F.Supp. 541 (D.Del.1961); In re Crow, 181 F.Supp. 718 (N.D.Ohio E.D.1959); Keeley v. Evans, 271 F. 520 (9th Cir. 1921), appeal dismissed 257 U.S. 667, 42 S.Ct. 184, 66 L.Ed. 426 (1921). However, the Supreme Court of the United States will review such orders where petitioner makes a substantial allegation that the disbarment proceedings violated the due process or equal protection clause of the Fourteenth Amendment. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); In re Patterson, 353 U.S. 952, 77 S.Ct. 869, 1 L.Ed.2d 906 (1957), 356 U.S. 947, 78 S.Ct. 795, 2 L.Ed.2d 822 (1958).

[6, 7] A thorough analysis of the Tenth Circuit cases consisting of Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962) and Howard v. United States District Court for the District of Colorado, 318 F.2d 521 (10th Cir. 1963), and the First Circuit case of In re MacNeil, supra, convinces me that the limits of review of a state court action in disbarment proceedings, are confined to violations of the due process or equal protection clauses of the Fourteenth Amendment and that a petition for writ of certiorari to the Supreme Court of the United States is the exclusive method of review. As pontificated by Chief Judge Magruder in the *MacNeil* case, "* * * even a child would wonder how the federal district court could possibly have original jurisdiction of a proceeding looking to disbarment of a lawyer from practice in the courts of the state. * * *" Those who serve on the Benches of the Federal District Courts are sufficiently busy within the confines of their own constitutional and statutory authority, without trying to second guess a highly respectable court, such as the Supreme Court of Oregon, in connection with the admission, suspension and disbarment of attorneys. Clark v. State of Washington, supra, commends the position taken by the Tenth and First Circuits,[5] and supports these views.

Defendants' motions for summary judgments should be allowed, and the cause dismissed.

It is so ordered.

REVISED SUPPLEMENTAL OPINION

[8, 9] The recent decision of the three-judge court in Campbell v. Washington State Bar Association and the Supreme Court of the State of Washington, 263 F.Supp. 991 (9th Cir. 1967), is in full support of the conclusion reached in my original opinion. The doctrine of immunity as expounded in DeLong Corp. v. Oregon State Highway Commission, 233 F.Supp. 7 (D.Or.1964), aff'd. 343 F.2d 911 (9th Cir. 1965), should shield the Courts of the respective states and the members thereof. Moreover, the plaintiff cannot proceed against the individual Judges under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Pierson, et al, v. Ray, et al, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288.

5. 366 F.

No. 21979

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE,

Appellant,

v.

F.M. SERCOMBE, et al.,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

THE HONORABLE JOHN F. KILKENNY, Judge.

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1200 American Bank Building
Portland, Oregon 97205

THOMAS H. TONGUE
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Attorneys for Appellees.

FILED

NOV 24 1967

WM. B. LUCK, CLERK

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Rule I, Rules for Admission of Attorneys in Oregon (reprinted in 235 Or 20) 3

Rule 8.05, Rules for Admission of Attorneys in Oregon (reprinted in 243 Or 28-29) . . . 7

No. 21979

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE,

Appellant,

v.

F.M. SERCOMBE, et al.,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

THE HONORABLE JOHN F. KILKENNY, Judge.

STATEMENT CONCERNING JURISDICTION

The complaint (C.T.[1] 1) cites the following authorities for invoking jurisdiction of the district court.

Constitution of the United States,
Amend. V, Amend. XIV

42 USCA §§ 1981-1988

28 USCA §1343

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1 The Clerk's Record is referred to herein as "C.T."
The Reporter's Transcript is referred to herein as "R.T."

State ex rel Oregon State
Bar v. Lenske, 243 Or 477,
405 P2d 510, 407 P2d 250
(1965) cert den 384 US 943,
86 S Ct 1460, 16 Led2d 541
reh den 384 US 1028, 86 S Ct
1920, 16 Led2d 1047

The district court held that it did not have "jurisdiction" to conduct an appellate review of the decision of the Oregon Supreme Court (C.T. 62, 70, 71).

Lenske v. Sercombe, 266 F Supp
609 (D Or, 1967)

Appellees[2] agree that the district court did not have such jurisdiction, both for the reasons set forth in Judge Kilkenny's opinion and for the reasons set forth in this brief.

This court has jurisdiction to hear this appeal pursuant to 28 USCA § 1291.

STATEMENT OF THE CASE

A. Summary of Facts

The underlying facts are contained in two opinions of the Supreme Court of the State of Oregon, which are, by reference, expressly made a part of the complaint (C.T. 1).

State ex rel Oregon State Bar
v. Lenske (Sep 9, 1965) 243 Or
477, 405 P2d 510

State ex rel Oregon State Bar
v. Lenske (Nov 3, 1965) 243 Or
477, 484, 407 P2d 250, cert den
384 US 943, 86 S Ct 1460, 16

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2 Appellees respectfully suggest the death on July 16, 1967, of Philip A. Levin, one of the appellees herein.

Led2d 541, reh den 384 US 1028, 86 S Ct 1920, 16 Led2d 1047

In summary, these facts are as follows:

While appellant was a member of the Oregon State Bar, he was convicted in the United States District Court in Oregon of income tax evasion. The Oregon State Bar filed with the Oregon Supreme Court a certified copy of the judgment of conviction. On the basis of that conviction and pursuant to Rule I of the Supreme Court Rules for the Admission of Attorneys[3] then in effect, the Oregon Supreme Court summarily suspended appellant from the practice of law. Appellant was notified of the order of suspension (Lenske deposition, pp 9-10). Thereafter, at the instance of the Oregon State Bar, an original contempt proceeding in the Oregon Supreme Court was instituted against appellant in which it was charged that he had violated the court's order of suspension by continuing to practice law and by holding himself out to the public and members of the Bar as eligible to practice law. An order to show

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3 "Rule I. Suspension after conviction of crime

"Whenever it appears to the Supreme Court that any member of the bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Court may summarily suspend such member. * * * The suspension shall continue until the member is reinstated by the Court." [Reprinted at 235 Or, Rules for Admission of Attorneys in Oregon p 20.]

cause was issued, appellant appeared, and the Oregon Supreme Court appointed a referee for the purpose of holding a hearing, taking testimony for that court, and making findings.

After the hearing before the referee and entry of findings by the referee, the Supreme Court of Oregon found that appellant had committed acts constituting the practice of law while having knowledge of the entry of the order of his suspension from the practice of law. The court concluded that appellant was guilty of criminal contempt of that court because of his violation of that court's order of suspension. The court sentenced appellant to pay a fine of $500 or to serve out such time in jail.

Appellant filed a petition for writ of certiorari with the United States Supreme Court,

Exhibit No. 2 to Lenske deposition
(identified at p 34)

which was denied,

384 US 943, 86 S Ct 1460,
16 Led2d 541 (1966)

and a "Petition for Rehearing and Reconsideration of Petition for writ of Certiorari,"

Exhibit No. 3 to Lenske deposition
(identified at p 34)

which was also denied

384 US 1028, 86 S Ct 1920,
16 Led2d 1047 (1966.

B. <u>This Litigation</u>

Appellant then filed this action in the United

States District Court in Oregon, naming as defendants the individual members of the Supreme Court of Oregon, the individual members of the Board of Governors of the Oregon State Bar, the Clerk of the Supreme Court of Oregon, the secretary of the Oregon State Bar and the attorney who acted for the Oregon State Bar in the prosecution of the criminal contempt proceedings against appellant (C.T. 1-2).

The complaint contains a variety of alleged violations of appellant's federal constitutional rights during the state court proceedings (C.T. 2-4). The complaint prays both that the suspension and contempt orders of the Supreme Court of Oregon be declared void and that the defendants be restrained and enjoined from doing any act toward enforcing the same (C.T. 4).

The three defendants who had been served (the Clerk of the Supreme Court, the secretary of the Bar and the attorney for the Bar), filed an answer (C.T. 5). They subsequently moved for summary judgment on the following grounds (C.T. 20-21):

1. No effective decree could be framed against them;
2. An act of Congress--28 USCA §2283--precluded the relief plaintiff was seeking;
3. Under established principles of federal-state judicial comity, res judicata and

jurisdiction, the district court should decline to entertain the action; and

4. Plaintiff was validly convicted of contempt.

At the initial hearing on the motion for summary judgment, counsel for the answering defendants requested that the court first consider the jurisdictional and procedural matters raised in points 1, 2 and 3 of the motion and reserve for later determination, if necessary, the questions raised by point 4, which would involve a consideration of appellant's constitutional charges (R.T. 38-39, 42-43, 59-60). The court acceded to this request (R.T. 39, 60-61).

After the hearing, appellant served the other defendants who in turn filed answers (C.T. 41, 48) and also moved for summary judgment (C.T. 45, 52). The defendants named as members of the Oregon State Bar based their motion upon the same grounds urged in the motion previously filed (C.T. 52-53). The members of the Oregon Supreme Court based their motion on the same grounds except that they did not urge that no effective decree could be entered against them (C.T. 45-46).

The district court granted the motions for summary judgment on the grounds that, as to all defendants other than the members of the Oregon Supreme Court, no effective decree could be framed and that, as to the individual members of the Oregon Supreme Court, the district

court should not attempt what, in essence, would be an appellate review of the state court proceedings (C.T. 62, 70, 71).

Lenske v. Sercombe, 266 F Supp 609 (D Or, 1967)

Appellant then appealed to this court (C.T. 67).

This court has since reversed appellant's income tax conviction,

Lenske v. United States, ___ F2d ___ (9 Cir, Aug 28, 1967)

and the Supreme Court of Oregon has since lifted the suspension order,[4] thus allowing appellant to again practice law.

In re Lenske, 85 Or Adv Sh No. 6 (Oct 24, 1967)

C. Question Not Presented

At the outset, it should be noted that appellant's

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4 Rule 8.05 of the Rules for Admission of Attorneys in Oregon, presently in effect and the successor to Rule I, supra, provides,

"Suspension after conviction of crime.

"If it appears to the Supreme Court that a member of the Oregon State Bar has been convicted of a misdemeanor involving moral turpitude or of a felony, the Supreme Court may suspend such member summarily. A judgment on a plea of nolo contendere is considered a conviction within the meaning of this rule. Rules of procedure relative to discipline do not apply to a suspension under this rule. The suspension continues until the individual is reinstated by the Supreme Court. If it is made to appear to the Supreme Court that the conviction is reversed on appeal, the suspension imposed under this rule shall be lifted." [Reprinted at 243 Or, Rules for Admission of Attorneys in Oregon pp 28-29] (Emphasis added).

3. Even if 28 USCA § 2283 is not a bar to issuance of the injunction, should the district court, under accepted principles of jurisdiction, comity and res judicata, decline to review appellant's charges?

SUMMARY OF ARGUMENT

The action should be dismissed as to all defendants other than the members of the Supreme Court of Oregon because no effective decree can be entered against them. In addition, and as to all defendants including members of the Supreme Court of Oregon, 28 USCA § 2283 prohibits the injunctive relief prayed for in the complaint. Even if 28 USCA § 2283 is not a bar to issuance of the injunction, the federal district court properly declined, under accepted principles of jurisdiction, comity and res judicata, to review appellant's charges.

ARGUMENT

I

NO EFFECTIVE DECREE CAN BE ENTERED AGAINST THE DEFENDANTS OTHER THAN THE INDIVIDUAL MEMBERS OF THE SUPREME COURT OF OREGON.

The object of the complaint is to obtain an injunction enjoining all the defendants from taking any action to enforce the suspension and contempt orders of the Supreme Court of Oregon. Such an injunction entered

against all defendants other than the members of the Supreme Court of Oregon would be a meaningless, futile and useless act. As pointed out by the district court, 266 F Supp at 611-612, the Supreme Court of Oregon has exclusive jurisdiction under its common law and statutory powers to suspend, disbar or reprimand members of the Oregon State Bar.

Jenkins v. Oregon State Bar,
241 Or 283, 405 P2d 525 (1965)

ORS 9.480[5]

ORS 9.540(4)[5]

At most, the Oregon State Bar has only the limited power to recommend to the Supreme Court of Oregon the suspension, disbarment or reprimand of a lawyer.

ORS 9.540(1)[5]

Jenkins v. Oregon State Bar,
supra

The defendants, other than the individual members of the Supreme Court of Oregon, have no standing or authority to enforce or refrain from enforcing the suspension and contempt orders.

Clark v. State of Washington 366 F2d 678 (9 Cir, 1966)

This case involved a factual situation remarkably analogous to the instant case. Clark was disbarred from the practice of law by the Supreme Court of Washington.

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5 Reprinted in Appendix

The Supreme Court of the United States denied certiorari and rehearing. Clark then brought this action against the State of Washington and the Washington State Bar Association under a Civil Rights Act, 42 USCA § 1983, alleging that the disciplinary proceedings were conducted in such manner as to violate his rights under the federal constitution. He sought a decree to vacate the judgment of disbarment, an injunction to restrain the defendants from revoking his license to practice law, an order to require the defendants to restore him to the list of active members of the Bar Association and damages. In affirming the dismissal of the action by the district court, this court stated with respect to the Bar Association:

> "The Bar Association had power to and did recommend to the Washington Supreme Court that it disbar Clark, R.C.W. 2.48.060, but it had no power to and did not disbar him. That power, together with the power to 'admit and enroll attorneys in the state of Washington,' is exclusively in the Washington Supreme Court. In re Bruen, 102 Wash. 472, 476, 172 Pac. 1152, 1153; In re Simmons, 59 Wn. 689, 369 P.2d 947, 956.
>
> "It follows that no effective decree can be framed against the Bar Association to afford Clark the relief he seeks in this action. The Supreme Court has stated that dismissal of an action is warranted when an indispensable party (the Supreme Court of Washington in this case) is not made a party to the action. See Williams, et al v. Fanning, Postmaster of Los Angeles, 332 U.S. 490, 493; Daggs v. Klein, 9 Cir., 169 F.2d 174, 176.
>
> "We therefore hold that the district court did not err in dismissing the action against the Bar Association." (p 682)

Hackin v. Lockwood, 361 F2d 499 (9 Cir, 1966), cert den 385 US 960, 87 S Ct 396, 17 Led2d 305

Hackin brought an action in the federal district court of Arizona against the individual justices of the Supreme Court of Arizona and The State Bar of Arizona, claiming that the defendants had violated his federal constitutional rights in regard to certain rules of admission to practice which denied him the right to take the Arizona Bar examination. With respect to The State Bar of Arizona, this court said:

> "The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court. Arizona Revised Statutes §32-237, subsec. 2 (1956)." (p 500)

It is axiomatic that a court will not entertain a cause where any decree entered will be ineffectual. No effective decree can be framed against any of the defendants, other than the members of the Supreme Court of Oregon. The judgment of dismissal as to the defendants other than the members of the Supreme Court of Oregon should thus be affirmed.

II

28 USCA § 2283 PRECLUDES THE ISSUANCE OF THE INJUNCTION PRAYED FOR IN THIS ACTION.

The authority of federal courts to enjoin proceedings in state courts has been severely limited by

Congress.

28 USCA § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Appellant would apparently rely upon

42 USCA § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The question, then, is whether the "suit in equity" authorized by § 1983 is an exception to § 2283 as a proceeding "expressly authorized by Act of Congress." On that question there is strong case authority holding that a suit under § 1983 is not an "expressly authorized" exception to § 2283 and, thus, that 28 USCA § 2283 prohibits the issuance of an injunction.

Goss v. State of Illinois
312 F2d 257, 259 (7 Cir, 1963)

Smith v. Village of Lansing
241 F2d 856, 859 (7 Cir, 1957)

Baines v. City of Danville 337 F2d 579 (4 Cir, en banc, 1964) cert den 381 US 939, 85 S Ct 1772, 14 Led2d 702, reh on other grounds (removal) 357 F2d 756, petition for writ of certiorari on that other ground (removal) only filed, 34 LW 3308

affirmed per curiam on that other ground (removal) 384 US 890, 86 S Ct 1915, 16 Led2d 996, reh den 385 US 890, ___ S Ct ____, 17 Led2d 121

Chaffee v. Johnson 229 F Supp 445, 447 (SD Miss, 1964) affirmed 352 F2d 514, cert den 384 US 956, 86 S Ct 1582, 16 Led2d 553

Cameron v. Johnson 262 F Supp 873 (SD Miss 3-judge court, 1966) probable juris noted ___ US ___, ___ S Ct ____, ___ Led2d ___, 36 LW 3126 (Oct 9, 1967)

The case most similar to the Lenske case is

Goss v. State of Illinois 312 F2d 257 (7 Cir, 1963)

Here, the plaintiff, who had been named as corespondent in a divorce suit, discussed the divorce suit on his local television show. His discussions resulted in his being held in criminal contempt by the state divorce court. The Supreme Court of Illinois ultimately affirmed the contempt conviction, and the Supreme Court of the United States denied certiorari and rehearing. Plaintiff then filed an action in the federal district court against the state, the county sheriff and the county district attorney asking for a declaratory judgment that his civil rights (freedom of speech and freedom of the press) would be violated if the mittimus for his arrest was not held void and its enforcement permanently enjoined.

The district court granted the injunction, but the Seventh Circuit reversed, saying, with respect to § 2283:

"Several decisions have pointed out that this section has not been modified nor is an exception engrafted thereon by the terms of the Civil Rights Act (42 U.S.C. § 1981 et seq.) or the Declaratory Judgment Act (28 U.S.C. § 2201 et seq.). H.J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505; Great Lakes Dredge & Dock Co. v. Huffman, 319 US 293, 63 S.Ct. 1070, 87 L.Ed. 1407; Smith v. Village of Lansing, 7 Cir., 241 F.2d 856; Sexton v. Barry 6 Cir., 233 F.2d 220.

"Although we have heretofore held herein that the District Court had no jurisdiction of this cause, in any event, 28 U.S.C. § 2283 would bar the assumption of jurisdiction. No act of Congress has authorized an exception to § 2283 which would cover this case. There is no judgment of a federal court to be protected. The clause "in aid of jurisdiction" has no application under the facts of this case." (p 259)

There is a decision of the Third Circuit holding that a suit brought under 42 USCA § 1983 is an exception to 28 USCA § 2283

Cooper v. Hutchinson, 184 F2d 119, 124 (3 Cir, 1950)

However, there is no discussion whatever of the question and the opinion accordingly provides no rationale for the holding.

On October 9, 1967, the United States Supreme Court noted probable jurisdiction in a case in which one of the questions to be argued is whether a suit under 42 USCA § 1983 is excepted from the prohibition of 28 USCA § 2283.

Cameron v. Johnson (No. 699)
___ US ___, ___ S Ct ___,
___ Led2d ___, 36 LW 3126

III

WHETHER OR NOT 28 USCA § 2283 IS A BAR, THE LOWER FEDERAL COURTS SHOULD DECLINE, UPON PRINCIPLES OF JURISDICTION, COMITY AND RES JUDICATA, TO INTERFERE WITH THE PROCEEDINGS OF THE OREGON SUPREME COURT IN THIS CASE.

Whether or not 28 USCA § 2283 is a bar, the fact is that federal courts consistently have refused and are refusing to hear such cases as the case at bar. The refusals are based upon principles of jurisdiction, comity or res judicata, or a combination of those principles.

a. Jurisdiction

Appellant is in effect asking a federal court to exercise appellate jurisdiction over the Supreme Court of Oregon. The Supreme Court of Oregon suspended appellant from the practice of law. Subsequently, he practiced law and was adjudged in contempt of court. Certiorari and rehearing were denied by the United States Supreme Court. The contempt conviction is a final judgment. Several federal courts faced with similar circumstances have dismissed the actions on the ground that the final state court judgments were not subject to review by the federal district court. These decisions point out that the federal district court generally has only original jurisdiction and that the only federal court which can exercise appellate

jurisdiction over state court judgments is the United States Supreme Court. Examples include:

> Rooker v. Fidelity Trust Co. 263 US 413, 44 S Ct 149, 68 Led 362 (1923)
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> Ash v. Northern Illinois Gas Company 362 F2d 148, 151 (7 Cir, 1966)
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> Schroeder v. State of Illinois 354 F2d 561, 563 (7 Cir, 1965) cert den 384 US 972, 86 S Ct 1862, 16 Led2d 682
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> Goss v.State of Illinois 312 F2d 257, 259 (7 Cir, 1963)
>
> Drawdy Investment Company v. Leonard 261 F2d 226 (5 Cir, 1958)
>
> Williams v. Tooke 108 F2d 758 (5 Cir, 1940) cert den 311 US 655, 61 S Ct 8, 85 Led 419

As pointed out by the district court in the case at bar, 266 F Supp at 612, the rule is well established in the analogous area of disbarments that the lower federal courts do not have "jurisdiction" to review state court decisions.

Gately v. Sutton, 310 F2d 107 (10 Cir, 1962)

> "The petitioner, Gately, formerly a practicing attorney in Colorado Springs, Colorado, relying upon one of the provisions of the Civil Rights Act, 42 U.S.C. § 1983, brought this action against members of the Supreme Court of Colorado requesting, in his prayer for relief, an order directing that Court to set aside an order of disbarment and damages in the sum of $500,000. This is an appeal from an order dismissing the petition upon the ground that the federal district court was without jurisdiction to award the relief prayed for.
>
> * * *

"The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct. Colo.Rev.Stat.1953, §§ 12-1-1, 12-1-8. The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585. See in re MacNeil, 1 Cir., 266 F.2d 167, cert. denied 361 U.S. 861, 80 S.Ct. 120, 4 L.Ed.2d 103; In re Noell, 8 Cir., 93 F.2d 5; In re Bennethum, D.Del., 196 F.Supp. 541; In re Crow, N.D. Ohio, 181 F.Supp. 718, aff'd 6 Cir., 283 F.2d 685; Keeley v. Evans, D.Or., 271 F. 520, appeal dismissed 257 U.S. 667, 42 S.Ct. 184, 66 L.Ed. 426. In Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342, the Supreme Court said:

> "'It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in Konigsberg v. California, 353 U.S. 252, [77 S.Ct. 722, 1 L.Ed.2d 810], and Schware v. Board of Bar Examiners, 353 U.S. 232 [77 S.Ct. 752, 1 L.Ed. 2d 796], to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. * * *'

"The limits of review referred to are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had. In re MacNeil, supra." (p 108, emphasis added).

Accord:

Howard v. United States District Court for Dist of Colo, 318 F2d 521, 523 (10 Cir, 1963)

Jones v. Hulse 267 F Supp 37 (ED Mo, 1967)

The plaintiff, an attorney, contended that his federal constitutional rights were violated in a suspension proceeding. He filed an action to enjoin the chairman and members of a state bar committee and the Clerk of the Missouri Supreme Court from initiating, taking or participating in any action to enforce a mandate of the Missouri Supreme Court suspending plaintiff's license to practice law. The defendants moved to dismiss and, in the alternative, for summary judgment. The court dismissed the action on the ground it lacked jurisdiction over the subject matter, stating:

> "It is well settled that Federal courts do not have jurisdiction to review an order of a state court disbarring an attorney in that state for personal and professional misconduct. In the Matter of the Disbarment of Rhodes, 370 F.2d 411 (CA8); Clark v. State of Washington, 366 F.2d 678 (CA9); Gately v. Sutton, 310 F.2d 107 (CA10); Howard v. United States District Court for the District of Colorado, 318 F.2d 521 (CA10); and Keeley v. Evans, 271 F. 520 (CA9), App. dismissed 257 U.S. 667.
>
> * * *
>
> "The plaintiff contends that this court should take jurisdiction over the present controversy by either viewing the action as an original civil action under the Civil Rights Act, 42 U.S.C.A. § 1983 and 28 U.S.C.A.§ 1343, or by viewing it as an original equitable action under 28 U.S.C.A. § 1331.

"The plaintiff's contention is without merit. Regardless of the label that the plaintiff is attempting to put upon the present action, it is obviously nothing more than an attempt to have this court review the mandate of the Supreme Court of the State of Missouri suspending the plaintiff's right to practice law in Missouri. Furthermore, were this court to take jurisdiction over the present case as an original civil suit, it would not only have to review the action taken by the Supreme Court of Missouri, but it would also have to review the action of the Supreme Court of the United States in dismissing the plaintiff's petition for a writ of certiorari.

"The fact that the present action is brought under the Civil Rights Act does not give this court jurisdiction over the subject matter as an original civil action. Gately v. Sutton, supra; Clark v. State of Washington, supra. The only method for the plaintiff to seek review of the decision by the Missouri Supreme Court suspending his license is to petition the Supreme Court of the United States for a writ of certiorari. Gately v. Sutton, supra. This the plaintiff has already done, and without success." (p 39)

Whether one uses the phrase "jurisdiction" or, as suggested by thiscourt in Clark v. State of Washington 366 F2d 678, 681 (9 Cir, 1966), the term "failure to state a claim," the result is that appellant is not entitled to the relief he seeks in the federal district court.

b. Comity

Comity involves a respect by the federal courts for the function which state courts serve in our governmental system. Even when a federal court has jurisdiction and can grant the relief requested, it will often refuse, because of comity, to interfere with a state court.

The United States Supreme Court has instructed the lower federal courts to be extremely reluctant to interfere in state court proceedings, especially criminal proceedings.

Douglas v. City of Jeannette
319 US 157, 63 S Ct 877, 87 Led
1324 (1943)

Stefanelli v. Minard 342 US 117,
72 US 118, 96 Led 138 (1951)

The rule of comity has been applied in situations very similar to that involved here.

Rhodes v. Houston 202 F Supp 624 (D Neb, 1962), affirmed per curiam 309 F2d 959, cert den 372 US 909, 83 S Ct 724, 9 Led2d 719

Plaintiff was an attorney. He was convicted of contempt of the state court, fined $2,500, and sentenced to nine months at hard labor. He then brought this action in the federal court against, among others, the Nebraska Supreme Court justices and the state trial judge, asking for damages and an injunction against his being imprisoned, arguing that his federal constitutional rights had been violated.

The court held that the injunction would be denied because of the delicate relationship between federal and state courts. The court pointed out that only rarely will a federal court interefere with the conduct of state officials, especially by injunction. The court refused, out of consideration of comity, to issue an injunction here.

Goss v. State of Illinois 312 F2d 257 (7 Cir, 1963)

This is the case discussed supra, pages 14-15, in which plaintiff had been convicted of contempt in a state trial court, the Supreme Court of Illinois had ultimately affirmed, and the United States Supreme Court had denied certiorari and rehearing. In holding that the plaintiff was not entitled to challenge this conviction in a federal court by declaratory and injunctive proceedings, even though he was claiming a denial of federal constitutional rights, the Seventh Circuit relied not only upon 28 USCA § 2283, but also on comity, saying:

> "By commencing this suit in the federal court after the Illinois Supreme Court had affirmed the criminal contempt conviction, and the Supreme Court of the United States had denied certiorari, plaintiff seeks to thwart the final state court judgment by relitigating, in a trial de novo, the very issues that had been litigated in the state court. If this newly discovered appellate procedure is permitted, many state criminal prosecutions will be faced with chaos and unenforceability.
>
> * * *
>
> "We live in a jurisdiction of two sovereignties. Each has its own system of courts which operates in a common territory. Great care should be taken to avoid embarrassing conflicts. An accused should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the state unless the necessary operation of such machinery prevents his having a fair trial. Wilson v. Schnettler, 365 U.S. 381, 81 S.Ct. 632, 5 L.ed.2d 620.
>
> "State judges, as well as federal, have the responsibility to respect and protect persons from violation of federal constitutional rights. The Supreme Court of the United States has the

right to pass on any such cases decided by the highest court of a state. Also, there is the remedy of federal habeas corpus which is predicated upon the accused submitting himself to custody after having exhausted state remedies.

"Federal courts have been and should be reluctant to interfere by injunction in a state court criminal proceeding. As stated by Mr. Justice Douglas in his dissent in Pugach v. Dollinger, 365 U.S. 458, at page 462, 81 S.Ct. 650, at page 652, 5 L.Ed.2d 678: 'The strongest expression of that reluctance is found in the general prohibition of federal injunctions "to stay proceedings in a State Court." 28 U.S.C. § 2283.'" (p 259)

Schroeder v. State of Illinois 354 F2d 561, 563,(7 Cir, 1965) cert den 384 US 972, 16 Led2d 682

Plaintiffs lost a condemnation case in the state court. They brought a civil rights action in the federal district court for injunctive relief and for a declaratory judgment that the state decisions were void. The Seventh Circuit affirmed the trial court's dismissal of the plaintiffs' suit stating:

"The relief sought is a declaration that the Illinois court decisions, in proceedings at trial and on review, are void even though the courts had jurisdiction of the subject matter and parties. These allegations, even if true, do not present either a gound for a federal question jurisdiction under 28 U.S.C. § 1331, since the state court admittedly had jurisdiction over the parties and the subject matter, Chance v. County Board of School Trustees, 332 F.2d 971, 974 (7th Cir. 1964); or a ground upon which to obtain review of the state court proceedings by a federal district court under 28 U.S.C.A. § 1343 through invocation of 42 U.S.C. § 1983, Goss v. State of Illinois, 312 F.2d 257, 259 (7th Cir. 1963). Schroeders' attempt 'to thwart' the final state court judgments by relitigating in a trial de novo the very issues which were, or should have been, raised in the state courts concerning state law, and upon which

certiorari to the United States Supreme Court might have been sought. To paraphrase what was said in Goss about permitting such 'appellate procedure,' if it were done many state court judgments would be faced with chaos and unenforceability. 312 F.2d at 259."

Stevens v. Frick, 259 F Supp 654 (SD NY, 1966), affirmed 372 F2d 378, cert den US , S Ct , 18 Led2d 973 (May 22, 1967)

The plaintiff author brought an action to enjoin defendant from further prosecuting a civil case against him in a Pennsylvania state court. Plaintiff claimed his federal constitutional rights would otherwise be violated. The district court dismissed the case, stating that whether or not 42 USCA § 1983 was an exception to 28 USCA § 2283,

"Even in those circuits which characterize section 1983 as an express authorization by Congress to enjoin state court proceedings, however, the assertion is tempered by the application of 'familiar rules of comity' and an awareness of the 'delicate balance' of federal-state relationships. See Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) and cases therein cited. Thus, even assuming the requisite degree of state action and, further, that section 1983 can properly be viewed as Congressional authority to stay improper state action, I am constrained to conclude that interference by this court with the Pennsylvania action would constitute an unwarranted distortion of sensible rules of comity." (p 657)

c. Res Judicata

The familiar principles of res judicata and collateral estoppel bar this action. Appellant is clearly attempting to relitigate in the federal court those issues which have already been raised and decided against him in

the state court in a judgment which is now final.

Hicks v. City of Los Angeles 240 F2d 495 (9 Cir, 1957)

A city civil servant was discharged from his job. He challenged his discharge both in administrative and state judicial proceedings. The state judgment against him became final. He then attempted to relitigate the whole matter in the federal courts on the ground that the state administrative and judicial officials had denied him due process under the federal Constitution. This court held against him on the ground that the action was barred by res judicata.

Accord:

Grubb v. Public Utilities Commission
281 US 470, 74 Led 972 (1930)

Wilke & Holzheiser, Inc. v. Reimel
266 F Supp 168 (ND Cal, 3-judge
court, 1967)

There is no reason for a federal court to interfere with the state court proceedings at this, the final stage of those proceedings. Appellant has had his day in court. He had his opportunity to present all his federal constitutional claims to the Supreme Court of Oregon and then to the United States Supreme Court which denied certiorari and rehearing. Appellant has lost that case. The federal courts should not now interfere with the right of the Supreme Court of Oregon to enforce its decision, a decision which has become final. Appellant should not be allowed to relitigate the same issues in the federal

district court.

CONCLUSION

For the reasons set forth hereinabove, the judgment of the district court should be affirmed.

Respectfully submitted,

CURTIS W. CUTSFORTH

THOMAS H. TONGUE

Attorneys for Appellees

APPENDIX

"ORS 9.480 Grounds for disbarment, suspension or reprimand.

"The Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that:

"(1) He has committed an act or carried on a course of conduct of such nature that, if he were applying for admission to the bar, his application should be denied; or

"(2) He has been convicted in any jurisdiction of an offense which is a misdemeanor involving moral turpitude or a felony under the laws of this state, or is punishable by death or imprisonment under the laws of the United States, in any of which cases the record of his conviction shall be conclusive evidence, or

"(3) He has wilfully disobeyed an order of a court requiring him to do or forbear an act connected with his profession; or

"(4) He is guilty of wilful deceit or misconduct in his profession; or

"(5) He is guilty of wilful violation of any of the provisions of ORS 9.460 or 9.510."

"ORS 9.540 Disciplinary proceedings conducted by board of governors; review by Supreme Court; costs.

"(1) The board of governors may, by a two-thirds vote of the board, after a hearing for any of the causes set forth in the statutes warranting disbarment or suspension, or for any breach of the rules of professional conduct, make an order recommending to the Supreme Court the disbarment of any member, or that such member be disciplined by reproval, public or private, or by suspension from practice. The board shall keep a transcript of evidence and proceedings in all matters involving disbarment or suspension and may make findings of fact. In any case, the board shall render a written decision on the proceedings. Notice, and a copy of the decision and any recommendation of the board,

certified by the secretary of the Oregon State Bar, immediately shall be transmitted by registered or certified mail to said member at his last-known postoffice address; and the board immediately shall file a copy of the decision and any recommendation, certified by the secretary of the Oregon State Bar with the transcript and findings, whenever findings are made, with the Clerk of the Supreme Court. Any person against whom the board shall make any such recommendation may, within 60 days after the filing of the certified copy of the decision and recommendation, petition the Supreme Court to review the decision and recommendation or to modify, reverse or reject the same. Upon review of any decision or recommendation of the board, the Supreme Court, after due notice and such hearing as the court may determine, may affirm, adopt, modify, reverse or reject the same, and thereupon shall make an appropriate order. When 60 days have elapsed after the filing of the certified copy, if no petition for review has been filed, the Supreme Court may affirm, adopt, modify, reverse or reject the decision or any recommendation of the board and make all necessary orders in conformity therewith.

* * *

"(4) The disciplinary grounds and procedures set forth in this chapter are not intended to limit or alter the inherent powers of the courts to disbar or discipline members of the bar."

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CURTIS W. CUTSFORTH
Of Attorneys for Appellees

No. 21979

United States Court of Appeals for the Ninth Circuit

- - - - - - -

Reuben G. Lenske,

Appellant

vs.

F. M. Sercombe, Clerk of the Supreme Court of the State of Oregon; John H. Holloway, Secretary of Oregon State Bar; Lamar Tooze, Jr., Attorney for Oregon State Bar; Wm. M. McAllister, Chief Justice, William C. Perry, Gordon Sloan, Kenneth J. O'Connell, Alfred T. Goodwin, Arno H. Denecke, Ralph M. Holman, Associate Justices, who comprise the Supreme Court of the State of Oregon; James G. Richmond, Philip Hayter, Carrell F. Bradley, John B. Fenner, Alfred F. Cunha, Wendell E. Gronso, Roy Kilpatrick, Herbert C. Hardy, John D. Ryan, Philip A. Levin, John E. Jaqua and Wallace A. Johansen, who comprise the Board of Governors of Oregon State Bar,

Appellees

****

APPELLANT'S REPLY BRIEF

****

Appeal from the United States District Court for the District of Oregon

****

Hon. John F. Kilkenny

****

Reuben G. Lenske,
1014 SW 2d Ave.,
Portland, Ore. 97204,
Appellant.

FILED
APR 15 1960

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IN THE UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

Reuben G. Lenske,

Appellant

v.

F. M. Sercombe, et al.,

Appellees

****

Appellant's Reply Brief

****

No conviction, no disbarment, no more suspension

On page 7 of my opening brief I stated that the trial court started out with the erroneous premise (See first paragraph of court's opinion on page 21 of my opening brief) that I was disbarred. I wish to thank counsel for Appellees for inferentially correcting that error of the court when, on page 7 of Appellees' brief they state that the Circuit Court of Appeals reversed the income tax conviction and that the Oregon Supreme Court "has since lifted the suspension order, thus allowing appellant to again practice law." Now may I correct some of Appellees' errors.

Notice of suspension - due process

In Appellees' summary of facts, page 3 of their brief, they say: "Appellant was notified of the order of suspension (Lenske deposition, pp 9-10)."

Thus, while Appellees contest the jurisdiction of the U.S. District Court to consider the case on its merits and urge that comity among courts should prevent the District Court from taking jurisdiction over the merits if it has the power, nevertheless

Appellees do seek judgment on the merits - but they do that based solely on the evidence presented (not introduced) by te and without giving appellant an opportunity to present evide on his own behalf. Even an admission by a litigant is not co- conclusive until he is given opportunity to deny or explain h mission. I make this "point of law" without reneging from wht said on deposition.

When the court does consider the issue of notice of the su pension order as a basis for a criminal judgment of contempt believe the trial court ultimately should, then it must come grips with the legal and constitutional question, "Is an uns and uncertified copy of a letter to the Oregon State Bar by Clerk of the Oregon Supreme Court, unaccompanied by a copy o suspension order, an adequate substitute for service of the of suspension?" And, "Will such substitute for service suppo a conviction for contempt in violating the terms of the susp sion order, if indeed they were violated?"

I submit that such evidence of knowledge of both the ent of a suspension order and the terms of the suspension order within the purview of due process be the basis for criminal l lity. The trial court refused to even let me state my positi thought it so preposterous, when I wanted to present to him t issue of whether in my case against Appellees they had suffic notice requiring an answer if it were proved by their own adm in answer to interrogatories, that they were handed copies of complaint and read it. Or would it be sufficient that they ha read about my filing the case against them in the newspapers? Mind you, the notice to me was to determine whether there was basis for putting me in jail and the notice to them was merel to determine whether they should answer my complaint.

I submit that under Oregon law and by any standard of du

process criminal liability cannot attach unless the order and its specific terms are set forth orally by the court in the presence and hearing of the accused or a certified copy of the order is served on the accused. Due process is as much a constitutional requirement between an accusing court and an accused lawyer as it is between two private litigants and when the court is merely a disinterested ajudicator.

The trial court, in its opinion, does not discuss this issue of law and does not say, as Appellees said above, that I was "notified of the order of suspension." It said, "The Oregon State Bar was notified of this suspension by letter, a copy of which was sent to plaintiff." Thus the trial court also considered the merits of the case based on evidence, albeit the evidence was not introduced, but it denied appellant an opportunity to produce evidence, not only on this point, but on the other issues in my complaint.

Who are proper defendants and are they properly named?

At the top of page 5 of their brief Appellees state that I named as defendants merely the individual members of the Supreme Court of Oregon and the members of the Board of Governors of the Oregon State Bar, inferring that the Court itself and the Oregon State Bar are not parties defendant. The trial court says likewise in its opinion, see page 22 of my opening brief. Also, the trial court held that the members of the Board of Governors and the prosecuting attorney and secretary of the Bar are not proper parties. See point 1-3 of the trial court's opinion on the same page and Argument I, pages 9-12 of Appellees' brief.

Appellees and the trial court ignore the fact that the case against me was a criminal case for contempt and that the Board of Bar Governors initiated the contempt proceedings and their attorney prosecuted me and that I alleged in my complaint (See page 19 of my opening brief):

"...defendants have threatened and do now threaten to imprison plaintiff under an order entered in violatio the requirements of the laws and constitution of the United States..."

I am seeking a restraining order against my imprisonm and it should appear clear to the defendant initiators and prosecutor that they, as well as the Supreme Court of Oreg should be restrained from taking the steps that are normall taken and are necessary to incarcerate me. If they did not do not threaten to initiate the necessary steps to incarce me they should so testify and the conclusion of whether th are or are not necessary or proper parties should then be decided. As the pleadings now stand they are proper partie I shall be pleased to have them disprove what I have alleg and I am aware that a pleading should not contain allegati which cannot be supported by proof.

I do not dispute the "exclusive jurisdiction" of the Court of Oregon to "suspend, disbar or reprimand" as state page 10 of Appellees' brief but it is fair to assume that the initiatory and prosecutory action of the other defenda the suspension and the contempt proceedings would not have taken by the Oregon Supreme Court and the threatened proce to incarcerate me would also remain unexecuted. Therefore proper for me to name the initiating malefactors as defend

Did I properly designate the Oregon Supreme Court as

This same type of question was raised in MacEwan v. H al., 226 Or 27, 359 P2d 413, 85 ALR 2d 1086 (1961).

In that case I sued the Oregon State Board of Health half of Dr. Alan MacEwan on account of the Board's refusal mit him to examine the Board's records on nuclear fallout

water, air, etc. I there named the Board and its members in the same manner that I named the Oregon Supreme Court and its members and Board of Bar Governors and its members in this case. The attorneys for the Board of Health in the MacEwan case raised the issue because one of the Board members was replaced. The majority opinion did not dignify the issue by making a specific point out of it; neither did the writers of the dissenting opinions.

Justice O'Connell, who wrote the majority opinion, did say on page 1086 of 85 ALR 2d:

> "Plaintiff brings this suit to require the defendants, who constitute the State Board of Health, to make available to the plaintiff data requested by him relating to nuclear radiation..."
>
> " (Page 1098) In the case at bar the plaintiff's request for data in the possession of the Board was, in practical effect, denied."
>
> "By this action on the part of the Board and its agents the plaintiff was deprived of this right of inspection under our statutes. Therefore the decree of the lower court is reversed and the cause is remanded with directions to enter a decree directing the defendants to permit plaintiff to inspect the records in the custody of defendants..."

The law as administered by the Oregon Supreme Court in that case should be applied in this case.

Does 28 USCA Sec. 2283 deprive the U.S. District Court of jurisdiction?

In my complaint I alleged that the U.S. District Court had jurisdiction under 42 USCA Sec. 1983, among other sections of the code. I neglected to mention that in my opening brief but counsel for Appellees were good enough to point that out in their brief. However, they point out under point II of their brief, page 12, that they contend that 28 USCA Sec. 2283 prohibits the injunction feature of this suit.

They quote 28 USCA 2283 and 42 USCA 1983 on page 13 of thei

They fail to analyze or consider Dombrowski v. Pfister 380 U.S. 479, 486, 489 or the note in 10 ALR 3d 727-794 and the numerous cases analyzed therein. They do, however, cite Cooper v. Hutchinson, 184 F2d 119, 124 (3 Cir, 1950) along with only one case, (see page 14 of appellees' brief) which has some similarity to this case. However, the princi set forth in the Dombrowski case by the United States Supre Court should control. I do not believe counsel for appellee themselves are convinced of the merit of their point II. They are more enthused over their point III commencing on page 16 of their brief.

Should the United States courts decline to take jurisdiction on grounds of comity and res judicata?

The question of res judicata cannot, of course, be deter until the U. S. court takes jurisdiction and makes its deter tion based on the facts and law. We are therefore left with the issue of comity. Before I go into that let me point out again that the trial court and appellees rely on evidenciary facts for their conclusions, facts not tested by evidence tha I wished to adduce. On page 16 of their brief appellees stat

> "The Supreme Court of Oregon suspended appellant from th practice of law. Subsequently, he practiced law and was adjudged in contempt of court."

Thus they say that I practiced law as a final fact. I alleged in paragraph VIII of my complaint, page 18 of my open brief, that I was found guilty of contempt merely for excerci my right under the First Amendment to the U. S. constitution, right available to any citizen. No evidence was introduced to prove the issue. This points up the trap frequently set by parties and courts for themselves in denying a full hearing o

the merits. While I believe that the opinion of the Supreme Court of Oregon that convicted me shows on its face that what I did was not practicing law, the basic question for the U. S. Court to decide is whether the Supreme Court of Oregon denied me the basic constitutional rights I claim in my complaint. It must be borne in mind that the Supreme Court was not acting as an appellate court but as a trial court. This brings us to the subpoint of:

The sufficiency of the complaint

The trial court on page 611 of 206 F.Supp. or page 22 of my opening brief says, "the total insufficiency of the complaint" could have been the basis of its decision. On March 21-23 600 members of the Oregon Bar attended a Federal Court Practice education conference. Judge Gus Solomon, chief judge of the U. S. District Court for Oregon made the clearcut statement to all 600 attendants that under our practice a complaint does not have to state a cause of action or suit. Present there as speakers were William Luck, Clerk of the U. S. Court of Appeals for the Ninth Circuit and Judge Ben Duniway of that court. Neither of the latter disagreed with Judge Solomon. The whole import of trial and pretrial procedure was that the complaint did not count, that pretrial conferences resulting in a pretrial order determined the issues, in which case the previous pleadings were eliminated. Why wasn't the usual practice followed in this case?

In a small but analogous way the shutting me up at appearance before the trial court, the court's statement about the "insufficiency of the complaint," and finally the granting of summary dismissal after denying me the right to answers to my interrogatories, are what the U. S. Supreme Court talked about in Sheppard v. Maxwell, 384 US 333, 16 L ed 2d 600, 86 S Ct. 1507.

The court said at page 349:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-Americ distrust for secret trials."
>
> "(page 351) The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago i Patterson v. Colorado, 205 US 454, 462, 51 L ed 879, 88 27 S Ct 556 (1907):
>
> 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence whether of private talk or public print.'
>
> "(Page 352) Only last term in Estes v Texas, 381 US 532, 14 L ed 2d 543, 85 S Ct 1628 (1965), we set aside a conviction despite the absence of any showing of prejudice. said there:
>
> 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiabl prejudice to the accused. Nevertheless, at times a proce will result that it is deemed inherently lacking in due
>
> "And we cited with approval the language of Mr. Justice for the Court in In re Murchison, 349 US 133, 136, 99 L 946, 75 S Ct 623 (1955), that 'our system of law has alwa endeavored to prevent even the probability of unfairness.

In my complaint I alleged numerous basic violations by th Court that convicted me, of constitutional guarantees under th U. S. constitution. No spirit of comity or comraderie should d prive me of the right or the adjudicators of my guilt the resp sibility to permit those allegations to be tested by the light evidence. I ask this court not to take as religious orthodox g pel that which the trial court said in its opinion and that wh the Oregon Supreme Court said in its opinions. These are state of fallible men, not infallible Gods. The evidence and its cor tion to the constitution should control, not comity.

Respectfully submitted,

No. 21980

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT M. ACTON, et al, Appellants, v. UNITED STATES OF AMERICA, Appellee.	)	No. 21980

APPELLANTS' OPENING BRIEF

THAYER C. LINDAUER
6½ N. San Francisco Avenue
Flagstaff, Arizona 86001

Attorney for Appellants

FILED

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WM. B. LUCK, CLERK

No. 21980

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT M. ACTON, et al,	)	
	)	
Appellants,	)	No. 21980
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

APPELLANTS' OPENING BRIEF

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I

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II

JURISDICTION

This action was originated by the United States of America in condemnation of property interest under 40 U.S.C. 257 and 10 U.S.C. 2663 establishing jurisdiction in the United States District Courts. *Forbes v. U.S.*, 268 Fed. 273 (C.C.A. Ala. 1920). This appeal to the Circuit Courts of Appeal is undertaken pursuant to 28 U.S.C. 1291.

III

STATEMENT OF THE CASE

The Congress of the United States, seeking to develop uranium source materials within the continental United States, passed the Atomic Energy Act of 1954, 42 U.S.C. 2011, et seq. The Congress recognized that private initiative and monies would be needed for such development and publicly entered a patriotic appeal to individual persons to prospect and develop uranium ore bodies on Public Lands.

Typical of the public appeal made pursuant to the provisions of the Atomic Energy Act of 1954 were the

statements of Lewis L. Strauss, Chairman of the Atomic Energy Commission, stated in a talk that he made on February 4, 1955, to the National Western Mining Conference in Denver, Colorado:

> "The paramount responsibility of the Atomic Energy Commission under the law is to advance a defense in security of the Nation, but second only to that prime obligation is the duty we have to develop and direct the uses of atomic energy for the general welfare of the cause of peace."
>
> "To meet both obligations -- military uses and the benign application -- the Commission directs a constantly expanding program which must at all times, have sufficient raw materials. And to insure that steady flow of those materials, we elected to rely upon reasonable incentives to private enterprise to bring about the greatest development of our uranium sources in the shortest possible time. This policy has succeeded and is a reaffirmation of the ingenuity and drive of our American free enterprise system."
>
> "Much credit for this is due to the individual prospector and operator. He has combed the area with his Geiger counter and worked his claim, often under rugged conditions that add considerable personal hardship. Sometimes this prospector was a veteran sourdough. Sometimes he was a complete novice to the uncertainties and privations of pioneering in a new industry and a forbidding terrain that could discourage all but the hardiest and most courageous." (T.R. 223-25).

Subsequent to the passage of the Atomic Energy Act of 1954 the Defendants-Appellants commenced prospecting

for uranium ore bodies on the Muggins Mountains in Western Arizona (T.R. 136, 168, 170-77). Valuable ore bodies were discovered (T.R. 135-40, 143, 170-77), and claims were located under Arizona mining law (T.R. 135, 138, 140, 145, 165-67). By the spring of 1956, the Defendants-Appellants had obtained Source Material Licenses from the Atomic Energy Commission (T.R. 147, 150). By the beginning of the year 1958 the Defendants-Appellants had not only located substantial numbers of claims, but had also spent substantial time and funds in the building of roads, causing geological surveys to be undertaken and completed, and had acquired various items of equipment in their preparation to commence actual mining operations (T.R. 137, 139, 142).

On January 15, 1958, the Department of the Army commenced the condemnation proceedings in this action. Thereafter, the applications of Defendants-Appellants for Atomic Energy Commission exploration permits were honored and accompanied by the reservation, in favor of the Commander, Yuma Test Station, stating as follows:

> "The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part as he deems is required by military necessity." (T.R. 154-57, 185-86).

The uranium prospecting permit, with the accompanying reservation in favor of the Commander, Yuma Test Station, never bore fruit by the issuance of preferential right leases from the Atomic Energy Commission, as normally would have occurred in due course as to the source deposits found by Defendants-Appellants, 42 U.S.C. 2097, due to the fact that the Commander, Yuma Test Station, terminated the prospecting permits immediately after their issuance (T.R. 159).

The present Defendants-Appellants in this action joined issue in the case and, on November 3, 1966, the Honorable Walter E. Craig, United States District Judge, entered an order denying Defendants-Appellants Motion for Summary Judgment and granting the Motion for Summary Judgment filed on behalf of the Plaintiff-Appellee United States of America (T.R. 247-50). Prior thereto, on July 13, 1964, the Honorable William C. Mathes, United States District Judge, had entered an order denying Plaintiff-Appellee's Motion for Summary Judgment against the instant Defendants-Appellants (T.R. 221-22).

Attorneys for Defendants-Appellants and for Plaintiff-Appellee United States of America, did, on December 15, 1961, enter into a stipulation whereby it

was agreed that if any claims for compensation were allowed for any of the defendants, all of the defendants represented by counsel for Defendants-Appellants would be afforded a reasonable opportunity to file answers and supplemental pleadings and to be heard in Court on any relevant issues (T.R. 188-89).

IV

SPECIFICATIONS OF ERROR

1. The United States District Court erred in its finding that the Defendants-Appellants' interest in the lands in question was that of a revocable right of entry.

2. The United States District Court erred in its ruling that the interest of the Defendants-Appellants in the lands in question was not an interest compensable under the laws of condemnation.

V

POINTS OF LAW AND FACT

The individual miners bringing this Appeal spent their time and large sums of money in the exploration and development of uranium ore bodies for the purpose

of opening productive mines to supply uranium to the Atomic Energy Commission (T.R. 137, 139, 142). The efforts of these individual miners culminated in the discovery of valuable uranium ore bodies (T.R. 135-40, 143, 170-77). Source Material Licenses from the Atomic Energy Commission were issued (T.R. 147, 150). At this point in time the lands in question, being a part of the Yuma Test Station, and administered by the Department of the Army, were left open to the Defendants-Appellants by the Department of the Army. The Atomic Energy Commission uranium prospecting permits issued upon a quasi-lease basis requiring an annual rental per acre (T.R. 154-57, 185-86), and containing a reservation in the Commander of the Yuma Test Station to revoke the right to enter upon the Test Station for military necessity, were issued after the commencement of the condemnation proceedings (T.R. 1); the inception of revocable rights of entry actually occurred after the condemnation proceedings had begun. The interest of Defendants-Appellants, if any, arose prior to the commencement of the condemnation proceedings in this case.

Defendants-Appellants have asserted in this cause that but for the acts of the Department of the Army

their activities upon the lands in question would have resulted in the valuable ore bodies found by them being worked and made productive under preferential right leases from the Atomic Energy Commission (T.R. 223-36). Nowhere does the United States of America contest this position. The Atomic Energy Act of 1954, 42 U.S.C. 2011, et seq. provides that upon bringing of the claim into production the ores are owned by the United States of America but the miner receives a percentage fee for the materials mined. The miners who have brought this Appeal contend that they found and developed something of value in the nature of interests in the lands in question, which interests have present determinable value as found Source Deposits of uranium ores and that these interests would have matured into interests normally recognizable under the laws of condemnation had they been allowed to proceed and obtain preferential right leases. Had the Atomic Energy Commission obtained the interests of the Defendants-Appellants, even if said interests were to be found to be solely a right to enter, the Atomic Energy Commission would have had to pay for the value taken in condemnation. 42 U.S.C. 2221 and 2096.

Defendants-Appellants contend that the District Court erred in finding that their interests were merely that of a revocable right of entry. The designation of their interests as a "right to enter" and its revocability for military necessity did not occur until after condemnation proceedings had commenced and their interest, such as it might be determined to be, had already been established. Thus the District Court made no determination whatsoever of the actual interests of the Defendants-Appellants in and to the lands in question. If, on the other hand, the interests of Defendants-Appellants are determined by the uranium prospecting permits issued after condemnation proceedings had begun (T.R. 154-57, 185-86), the record in this cause is devoid of any statement reference or claim whatsoever by the United States of America that military necessity required the revocation of the rights and interests of Defendants-Appellants. 10 C.F.R. 60.9(e) does in fact allow the government agency administering the lands, in this case the Department of the Army, the right to include special terms. Having included the special term of revocation by "military necessity" a showing of such military necessity is a condition precedent to the

termination of the rights of Defendants-Appellants and until such condition precedent be met the Defendants-Appellants must be considered to have an interest which has never been revoked and is therefore not revocable for the purposes of this action.

Defendants-Appellants at no time during the long duration of this cause were allowed to present at trial direct evidence of the nature and extent of their claim into the lands in question. Under the actual situation of conditions imposed after condemnation proceedings had begun Defendants-Appellants contend that they are not only entitled to full and complete hearing so that the nature of their interest can be determined, but that under the facts as developed in the record in this cause the Defendants-Appellants in fact do have an interest which should be declared compensable in condemnation proceedings.

In the case of *United States v. Town of Nahant*, 153 F. Rep. 520, at 523, the United States of America sought to condemn the interest of the town of Nahant in a piece of property which the town had previously sought to condemn but had not completed condemnation by the payment of the condemnation proceeds. The

Court recognized that the Town of Nahant did not have an "interest in real property." The Court nonetheless required that compensation be paid in the condemnation proceedings by the United States for the equitable interest of the Town of Nahant. The Court stated:

> "We think the Constitution contemplates just compensation for such interest as a party has and such as is taken. Of course, it must be an interest or a right recognized as of some value under legal or equitable principles."

The Court in *United States v. Town of Nahant* acknowledged an accepted principle in condemnation, to the effect that the United States Courts in condemnation cases have the right to sit as Courts of Equity and in such capacity may declare compensable interest even though the interest has not matured into "interest in real property." Likewise, asserting equitable powers on the part of the United States Court, in cases otherwise inapplicable to the instant situation, see *Admiral Oriental Line v. United States*, 86 F.2d 201, and *Werner v. United States*, 188 F.2d 266.

VI

CONCLUSION

Defendants-Appellants respectfully request that this Court exercise its powers in equity and recognize the value of the ore bodies located at great expense by Defendants-Appellants and declare that the interests of Defendants-Appellants, unmatured into preferential right leases under the Atomic Energy Act of 1954 due to the intervention of the Department of the Army, are recognizable interests in condemnation and that the fact that another agency of the United States Government other than the Atomic Energy Commission has limited and taken their interests does not alter their value nor alter the right of the holders thereof to reasonable compensation in condemnation.

Respectfully submitted,

/s/ Thayer C. Lindauer

Thayer C. Lindauer
Attorney for Defendants-Appellants

VII

REFERENCE TO EXHIBITS

[Note: Exhibits are listed in order of their appearance with page reference to the Record.]

1. Excerpt of speech of Lewis L. Strauss, Chairman of the Atomic Energy Commission, February 4, 1955, contained in Appellants' Motion for Summary Judgment [T.R. 223-25] . . . 2

2. Statements of mining activities of various Appellants [T.R. 136, 168, 170-77] 3

3. Descriptions of ore bodies found by various Appellants [T.R. 135-40, 143, 170-77] . 3

4. List of uranium ore claims established with tables showing uranium content [T.R. 135, 138, 140, 145, 165-67] 3

5. Source Material Licenses issued to Appellants Harrell & Wilhite and Flack & Tone [T.R. 147, 150] 3

6. Descriptions by various Appellants of investments and mining preparations [T.R. 137, 139, 142] 3

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ATTORNEY'S CERTIFICATION

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Thayer C. Lindauer

Thayer C. Lindauer

AFFIDAVIT OF SERVICE BY MAIL

THAYER C. LINDAUER, being duly sworn, says that he deposited three (3) copies of the foregoing Appellants' Opening Brief in final printed form in the United States post office in the City of Flagstaff, State of Arizona, enclosed in an envelope addressed to Mr. Roger P. Marquis, Assistant Attorney General, Land & Natural Resources Division, U. S. Department of Justice, Washington, D. C. 20530, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States post office in the City of Flagstaff, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 6th day of December, 1967.

/s/ Thayer C. Lindauer

Thayer C. Lindauer

Subscribed and sworn to before me
this 6th day of December, 1967.

/s/ Annette Y. Lind [SEAL]

Notary Public

My commission expires
November 1, 1971.

Nos. 21980 and 21980-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT M. ACTON, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

V. W. CLIFTON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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OPINION BELOW

The district court's unreported memorandum opinion is contained in the record of No. 21980 at pages 247-250.

JURISDICTION

Jurisdiction of the district court over these consolidated federal condemnation proceedings rests on 28 U.S.C. sec. 1358. Summary judgment was entered on November 3, 1966 (R. 247-250). Notices of appeal were filed on November 18, 1966 (R. 258,314). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether appellants as holders of revocable uranium prospecting permits on lands within the federal public domain are entitled to compensation under the Fifth Amendment to the Constitution when the permits are withdrawn.

STATEMENT

This is an appeal from a summary judgment entered November 3, 1966, declaring that the cancellation by the United States of these 24 appellants' revocable uranium prospecting permits is not a taking of property for which the United States must compensate appellants.

This condemnation proceeding was brought in January 1958 by the United States to acquire a leasehold estate in the outstanding interests in 869,981 acres of land

utilized for the Yuma Test Station in Arizona. Virtually all of this land was federal public domain.

Prior to the commencement of this proceeding, on July 1, 1952, Public Land Order No. 848 [1/] withdrew all public domain within this area from all forms of appropriation under the Public Land Laws, including mining and mineral leasing laws. Thereafter, revocable uranium prospecting permits were issued to appellants by the Atomic Energy Commission pursuant to the authority of Section 67 of the Atomic Energy Act of 1954, as amended, 68 Stat. 919, 934, 42 U.S.C. secs. 2011, 2097, and Title 10 C.F.R. sec. 60.9, which provides that where permits have been issued to prospect for uranium upon lands administered by the governmental agencies those agencies may prescribe additional terms and conditions to permit such agencies to fulfill appropriately their functions and obligations. In the alternative, such agencies may refrain from issuing permits upon such lands. Sec. 60.9(e) reads in relevant part as follows:

1/ Published in the Federal Register on July 8, 1952, 17 Fed. Reg. 6099.

> * * * However, since the lands affected by this section are administered by other Government agencies having responsibilities in connection with the administration of land, it probably will be necessary to include in particular permits and leases additional terms and conditions designed to permit the agencies involved to fulfill appropriately their functions and obligations or to refrain from issuing permits or leases * * *.

In accordance with the provisions of the above regulations, upon receipt of the specified $10 filing fee and of the annual fee of 25 cents per acre specified in Section 60.9 (f), the Commission issued prospecting permits on the Yuma Test Station to appellants (R. 154-155, 156-157, 185-186). Since the Agency having administrative control over the surface of the land was the Department of the Army, all such permits were expressly qualified by the following reservation:

> "5. The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part at any time as he deems it required by military necessity. Such withdrawal may be only temporary or permanent and may be without prior notice, in which event it is agreed that evacuation will be made with the greatest possible expediency, as to personel and equipment."

Appellant Clifton was further notified of the revocable nature of his prospective permit by a letter dated April 23, 1957, from Lawrence J. Lee, Captain, AGG, Adjutant

of the Headquarters Yuma Test Station which expressly stated: "This permit may be withdrawn by the Commanding Officer, Yuma Test Station at any time deemed necessary by him." (R. 158.) It was so withdrawn for military purposes (R. 1).

On April 8, 1964, the United States moved to dismiss the permit holders as parties defendant in this condemnation proceeding on the ground that they were improperly joined because no compensable interests were vested in them. This motion was denied by the Honorable William C. Mathes on July 13, 1964 "without prejudice to renew at a later date." (R. 221.)

On September 16, 1966, certain appellants moved for summary judgment as to the issue of liability of the United States for payment in condemnation (R. 223). The United States cross-moved for summary judgment declaring that said appellants have no compensable interest in the property condemned as a matter of law (R. 238).

On November 3, 1966, the district court made an order denying appellants' motion for summary judgment and granting the Government's motion for summary judgment, holding that the "reservations in the permits in question specifically contemplated the withdrawal of the lands in question and the termination of the permits, which act was accomplished upon the institution of these condemnation proceedings. The defendants

[viz. appellants] acquired the permits with full knowledge of the risks to be incurred." (R. 247-250.) This appeal followed

SUMMARY OF ARGUMENT

In exercising its power of eminent domain, the United States is required by the Fifth Amendment to pay just compensation for property which it takes. Any possessory interest in real property can be private property subject to eminent domain and as such, compensable. Property interests within the meaning of the Fifth Amendment include fee, life estates, terms for years, tenancies from year to year or month to month and subtenancies.

Revocable permits, on the other hand, being mere licenses, create no right, title, interest or estate in land cognizable by the Fifth Amendment, and as such may be withdrawn at any time for use by the sovereign without payment of compensation.

Since appellants held revocable prospecting permits not amounting to vested property rights for which, upon withdrawal, compensation must be made under the Fifth Amendment, they were improperly joined in this condemnation proceeding and summary judgment was properly granted against them.

ARGUMENT

I

THE UNITED STATES IS NOT REQUIRED BY THE FIFTH AMENDMENT TO PAY COMPENSATION WHEN IT WITHDRAWS A REVOCABLE PERMIT FOR URANIUM PROSPECTING ON LANDS WITHIN THE FEDERAL PUBLIC DOMAIN

When the United States takes private property for a public use, the Fifth Amendment requires the Government to pay just compensation. The Fifth Amendment, however, recognizes only vested property rights, not such tenuous rights as licenses and permits, even though they may be valuable.

Thus, an estate or tenancy for years or at will is recognized as private property within the meaning of the Fifth Amendment. United States v. General Motors Corp., 323 U.S. 373, 378-379 (1945). If a tenant's lease has expired, however, and no renewal has been executed, the tenant has no interest in land for which upon condemnation payment must be made. United States v. Honolulu Plantation Co., 182 F.2d 172 (C.A. 9, 1950), cert. den., 340 U.S. 820. See Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007 (C.A. 2, 1944), cert. den., 322 U.S. 747.

So, in United States v. Petty Motor Co., 327 U.S. 372 (1946), the Supreme Court held that a tenant whose lease

contained a "termination by condemnation" clause was without any right of recovery in a condemnation proceeding. As in Petty, appellants herein have "no right which persists beyond the taking and can be entitled to nothing." Likewise in United States v. Marks, 187 F.2d 724 (C.A. 9, 1951), cert. den., 342 U.S. 823, an unconditional reservation in a lease of the Government's right to withdraw public land for national purposes gave rise to no liability in favor of the lessee upon cancellation.

A license does not amount to property for which the United States may be liable upon condemnation. McNeil v. Seaton, 281 F.2d 931, 934 (C.A. D.C. 1960). In Sinclair Pipe Line Company v. United States, 287 F.2d 175 (C.Cls. 1961), a pipeline company sued to recover compensation for the taking of its right to maintain a pipeline across land acquired by the Government through condemnation. The agreement under which the pipeline had been installed recited that the installation was a "privilege as a mere license revocable and terminable upon notice * * *."

The court reviewed the authorities, including Thompson on Real Property (1939 ed.), vol. I, sec. 318, which stated:

> A license is a mere permission or personal and revocable privilege without the licensee possessing any estate in the land. A license possesses no property in land and no interest in it.

The pipeline company was therefore entitled to neither compensation for the loss of its license, nor to payment for its relocation expenses.

Most nearly analogous to appellants' prospecting permits herein are grazing permits on public lands granted to cattlemen under the Taylor Grazing Act. Like prospecting permits, grazing permits create no right, title, interest or estate in public lands, but only a withdrawable privilege. Upon revocation the licensee has no property rights against the United States which are compensable in condemnation. United States v. Cox, 190 F.2d 293, 294, 296 (C.A. 10, 1951), cert. den., 342 U.S. 867; Osborne v. United States, 145 F.2d 892 (C.A. 9, 1944); Bowman v. Udall, 243 F.Supp. 672, 678 (D.C. 1965), aff'd 364 F.2d 676, sub nom. Hinton v. Udall (C.A. D.C. 1966).

Appellants have repeatedly emphasized that they have spent sums of money, apparently under the belief that they have somehow acquired a right, legal or equitable,

against the Government. Appellants are in error. As this Court itself noted in Osborne, many permits issued by the sovereign are highly valuable as between private persons, but they may be revoked by the sovereign without payment of compensation (145 F.2d at 896, fn. 5):

> Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, Louisville Bridge Co. v. United States, 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; United States v. Wauna Toll Bridge Co., 1942, 9 Cir., 130 F.2d 855; licenses to erect river and harbor structures, United States v. Chicago, M., St. P. & P. R. Co., 1941, 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064; Willink v. United States, 1916, 240 U.S. 572, 36 S.Ct. 422, 60 L.Ed. 808; Greenleaf Johnson Lumber Co. v. Garrison, 1915, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; United States v. Chandler-Dunbar Water Power Co., 1913, 229 U.S. 53, 70, 33 S.Ct. 667, 57 L.Ed. 1063; Berger v. Ohlson, 1941, 9 Cir., 120 F.2d 56; permits to erect and maintain telephone and power lines, Swendig v. Washington Co., 1924, 265 U.S. 322, 44 S.Ct. 496, 68 L.Ed. 1036; United States v. Colorado Power Co., 1916, 8 Cir., 240 F. 217, 220; licenses to occupy, lease, or sell fishing areas, Lewis Blue Point Oyster Cultivation Co. v. Briggs, 1913, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083.

The court in Cox acknowledged that the grazing permits before the court were valuable, writing (190 F.2d at 295-296):

Unquestionably, the grazing permits were of value to the ranchers. They were an integral part of the ranching unit—indeed, the fee lands are practically worthless without them. But, "the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be." Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 178, 77 L.Ed. 331. The Constitution requires only that the sovereign pay just compensation for that which it takes, "not for opportunities which the owner may lose." United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 282, 63 S.Ct. 1047, 1056, 87 L.Ed. 1390. Just compensation for that which is taken does not include consequential losses to owner. Mitchell v. United States, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644; United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729; United States v. Willow River Power Co., 324 U.S. 499, 510, 65 S.Ct. 761, 89 L.Ed. 1101; United States v. Miller, 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 366. "Such losses may be compensated by legislative authority, not by force of the Constitution alone." United States v. Willow River Power Co., supra, 324 U.S. at page 510, 65 S.Ct. at page 767, 89 L.Ed. 1101.

* * * But, in our view, there can be no legally significant difference in the withdrawal of the permits for war purposes by the Secretary of the Interior, as in the Osborne case, and the cancellation of the permits by a declaration of taking in condemnation proceedings. In either case, the Government, by appropriate action, has exercised its unquestionable power to take only that which it owns, and in which the condemnee has no compensable interest. * * * (Emphasis supplied.)

Appellants in No. 21980 argue that under Section 171 of the Atomic Energy Act of 1946, as amended, 68 Stat. 952, 42 U.S.C. sec. 2221, the Commission is required in condemnation to pay for the revocation of a right to enter. This is not so. Section 171 requires the United States to "make just compensation for any property or interests therein taken or requisitioned * * *." This in no wise adds anything to the underlying concept that the United States must pay only for the taking of private property, not a mere license, as here, which does not rise to the estate of private property within the meaning of the Fifth Amendment. United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 281 (1943). Had Congress intended to change the law and make a gift to licensees, it would have had to do so by express language, as it did when, in 1942, it amended the Taylor Grazing Act by adding Section 315q, which permits payment on administrative determination for the cancellation of grazing permits or licenses where a taking is for "war purposes." 2/ This statute even specifies the fund from which payment is to be made. 56 Stat. 654, as amended, 43 U.S.C. sec. 315q.

2/ Section 315q as originally enacted applied to takings only for "war purposes." Thereafter, the section assumed its present form when it was amended to include takings for "war and national defense purposes."

While, on other occasions, Congress has provided for payment in excess of just compensation, see, e.g., Brown v. United States, 263 U.S. 78 (1923); United States v. Realty Co., 163 U.S. 427 (1896), Congress cannot by implication be held to have made gifts from the public treasury; hence, an assumption of liability not otherwise existing is not to be presumed or implied. Pine Hill Coal Co. v. United States, 259 U.S. 191 (1922). And even where Congress has conferred a gratuity, a "* * * further burden * * * should not be added to the gift without the use of the very plainest language." District of Columbia v. Johnson, 165 U.S. 330, 339 (1897).

Finally, as the opinion of the court below correctly states, appellants' authorities do not sustain their interpretation of Section 66 of the Atomic Energy Act of 1954, as amended, 68 Stat. 933, 42 U.S.C. sec. 2096, as allegedly authorizing compensation to them. 3/ Admiral Oriental Line v. United States, 86 F.2d 201 (C.A. 2, 1936), was a libel in admiralty to recover money paid to respondent's use. Werner

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3/ The congressional direction that "* * * just compensation shall be made for any right, property, or interest in property, taken, requisitioned, condemned, or otherwise acquired under this section" does not operate to convert hitherto non-compensable revocable licenses into compensable property interests within the meaning of the Fifth Amendment. The section merely declares, but does not change, the existing law.

v. United States, 188 F.2d 266 (C.A. 9, 1951), was an action for reformation of a lease and to recover a sum of money for use and occupancy of land leased. Neither case involved revocation of leases or compensable interests. United States v. Nahant, 153 Fed. 520 (C.A. 1, 1907), is likewise distinguishable. There the Government was condemning land previously condemned by the Town of Nahant and the issue was whether the original taking was valid. The court held that the town's interest was sufficient to be compensable.

In sum, the court's holding in the Cox case (190 F.2d at 296), stating the proposition that the withdrawal of a revocable permit is noncompensable, applies with equal force here:

> Although the permits are valuable to the ranchers, they are not an interest protected by the Fifth Amendment against the taking by the Government who granted them with the understanding that they could be withdrawn at any time without the payment of compensation.

II

THERE IS NO SUPPORT IN LAW FOR APPELLANT CLIFTON'S OTHER ASSERTIONS

Appellant Clifton, appearing pro se, has raised various assertions of alleged illegality and error below. Because no major issues are raised, we treat these assertions summarily:

1. Clause 2 of Article VI of the United States Constitution which provides that the Constitution "* * * Shall be the supreme law of the Land;" is incontrovertible; it does not in any way enhance appellant Clifton's case.

2. The Fourth Amendment relating to unreasonable searches and seizures is likewise irrelevant to appellant Clifton's case, and to condemnation proceedings (Br. 2).

3. The Sixth Amendment which guarantees "speedy and public trial by an impartial jury * * * and to have the assistance of counsel for his defense" is expressly limited to criminal prosecutions. The right to a jury trial does not exist in federal condemnation cases, as this Court has held in Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357-358 (1966); see United States v. Hess, 71 F.2d 78, 80 (C.A. 8, 1934). Moreover, there is no indication that any court is prepared to apply the right-to-counsel doctrine established in Escobedo v. Illinois, 378 U.S. 478 (1964), and Gideon v. Wainwright, 372 U.S. 335 (1963), to civil cases. The record reveals, moreover, that appellant Clifton was originally represented by counsel in this proceeding.

4. The granting of summary judgment is not a denial of the right to trial by jury guaranteed by the Seventh Amendment. Ex parte Peterson, 253 U.S. 300 (1920); Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902); United States v. Strangland, 242 F.2d 843 (C.A. 7, 1957); Lindsey v. Leavy, 149 F.2d 899 (C.A. 9, 1945).

5. The prohibition in the Fourteenth Amendment against deprivation of "life, liberty, or property, without due process of law" and the guarantee of "equal protection of the laws" is addressed to the states, not the federal government; in any event, due process of law has been accorded appellant here.

6. Whether the acquisition of land for military use is proper is a legislative function, not open for judicial review. United States v. Twin City Power Co., 350 U.S. 222 (1956); United States ex rel T.V.A. v. Welch, 327 U.S. 546, 551-552 (1946). Likewise, the quantity of the land taken is not reviewable. Berman v. Parker, 348 U.S. 26 (1954).

7. The rights retained by the people under the Ninth Amendment are not disparaged. See Ashwander v. T.V.A., 297 U.S. 288, 330, 331 (1936).

8. The reserved state powers guaranteed by the Tenth Amendment are not violated by the federal action relating to the public domain lands herein. See, Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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JANUARY 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACQUES B. GELIN

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. CIVIL 21981

BENJAMIN F. MARLOWE,

Appellant,

VS.

J. FRANK COAKLEY, Individually, and as DISTRICT ATTORNEY OF ALAMEDA COUNTY, STATE OF CALIFORNIA, LOWELL JENSEN, Individually, and as ASSISTANT DISTRICT ATTORNEY OF ALAMEDA COUNTY, STATE OF CALIFORNIA, C. HERBERT, Individually, and as INSPECTOR for the DISTRICT ATTORNEY'S OFFICE, ALAMEDA COUNTY, STATE OF CALIFORNIA, THE STATE OF CALIFORNIA, THE PEOPLE OF THE STATE OF CALIFORNIA, THE COUNTY OF ALAMEDA, FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, and TENTH DOES, and XYZ COMPANY, INCORPORATED,

Appellee.

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APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPELLEES

STATEMENT OF FACTS

The essence of Appellant's complaint against the defendant-Respondents is that the defendants willfully and deliberately and knowingly used perjured testimony before the Grand Jury of Alameda County for the purpose of obtaining an indictment against Plaintiff-Appellant, and that said Respondents willfully and deliberately suppressed evidence within their knowledge in order to obtain said indictment. Appellant further charge defendants with misuse of the office

of District Attorney and that the said District Attorney of Alameda County, under color of office, abused the judicial process by use of perjured testimony and suppression of evidence; that said District Attorney was motivated by vindictiveness and a long-standing grudge against Appellant, which hostility is common knowledge in Alameda County; that Appellant was denied due process of law in that Appellant was denied a speedy trial and was not accorded equal rights and protection under the 5th and 14th Amendments of the Constitution of the United States; that all of the Respondents did conspire and act in collusion; the said Respondents filed a Motion of Dismissal of said complaint on the ground that the said Respondents were clothed with absolute immunity; the motion to dismiss was granted without comment or opinion.

ARGUMENT

WHETHER OR NOT THE DISTRICT ATTORNEY IS CLOTHED WITH ABSOLUTE IMMUNITY

Although the complaint as filed in the U.S. District Court contains a number of issues, all of which issues are incorporated herein by reference, the principle issue is whether or not a District Attorney is clothed with absolute immunity, since this appears to be the basis for the dismissal of the complaint.

To adopt the proposition that a District Attorney, as a Prosecutor, is clothed with absolute immunity is to

espouse the despotic and tyrannical philosophy condemmed by Patrick Henry in his famous and long remembered speech denouncing the tyranny of England in the days before the Revolutionary War. To declare that a Prosecutor can act with absolute immunity is to forget the tyranny, the despotism and oppression which brought King John of England to Runnymede and which gave birth to the Magna Carta, as well as the Bill of Rights of our own Constitution.

The Appellate Courts of the State of California have long ago enunciated the principles that prosecuting attorneys should do their duty faithfully but no more. They should never act as employed counsel nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. People vs. Butler, 8 C 453. In People vs. Pang Sui Lin, 15 CA 260, 114 P 582, the court declared that a fair trial for the defendant should invite and receive from the District Attorney the same solicitous consideration as the conviction of the guilty, and it is as much his duty to safeguard the defendant's constitutional rights as to seek a conviction.

The Respondents make no pretense that said Respondents were merely faithfully performing their duty "but no more" or that said Respondents in the pursuit of their duty safeguarded the Appellant's constitutional rights. The very conduct of Respondents appears to be

that said Respondents are free to use perjury at will to obtain indictments even though it may be solely for the purpose of revenge and then claim absolute immunity by hiding behind the skirts of the law claiming sanctuary by virtue of their office. This is the obvious inference to be drawn from their attitude as reflected in their arguments. In determining whether plaintiff's complaint stated a cause of action plaintiff's allegations must be accepted as true. MILLER vs. GLASS 44 C2d 359, 282 P2d 501. Plaintiff's complaint is clear and unmistakable in its allegations that the Respondents knowingly used perjury and knowingly and deliberately suppressed testimony for the sole purpose of obtaining an indictment against appellant. Paragraph IX of the complaint CT p. 10, lines 4 - 12.

To borrow a phrase from Justice Hand, it would indeed "be monstrous" to support the proposition that a District Attorney can knowingly use perjury to obtain an indictment and then claim immunity from civil liability. This concept cannot be supported or justified in logic, or reason, nor can any authority be found for the same in the Constitution, statutory, or case law. Respondents have attempted to twist and distort the words of Judge Learned Hand to suit their purpose. It will be noticed that Judge Hand spoke of "honest mistakes". He did not even remotely intend to support the doctrine that a District Attorney can willfully and deliberately use perjury to obtain an

indictment and then claim immunity. One who is acting in the public good need not nor is expected to resort to suppression of testimony. Respondents also rely on Tenney vs. Brandhove, Brief 41 US 367 (1951), Agnew vs. Moody, 330 F2d 868 (9th Circuit 1964). Each of these cases are clearly distinguishable on its facts from the case at bar. The case cited by Respondents to wit Robichard vs. Ronan, 351 F2d 533 (9th Circuit 1965) enunciated, among others, the principle "even a prosecuting attorney may not be immune if he goes beyond the normal functions of a prosecuting attorney and engages in police work." It can scarcely be contended that the normal functions of a prosecuting attorney is to willfully and deliberately use perjury to obtain an indictment or to willfully and deliberately suppress testimony for the sole purpose of misleading a Grand Jury in order that he may obtain an indictment.

This court in Cohen vs. Norris, 300 F2d 24 clearly enunciated the following principles which are contrary to the contentions of the appellees.

1. The 4th Amendment of the Constitution of the United States guarantees the right of an individual to be secure against unreasonable arrests as well as against unreasonable search and seizure and a civil cause of action for conspiracy may be based on the statute as to civil actions for deprivations of civil rights 42 USCA 1983.

2. Under "color of state statute" within statute

providing that a person, who, under color of any statute of a state, deprives another of his constitutional rights shall be liable, pertains to conduct of actor clothed with authority of state while purporting to act thereunder whether the conduct complained of was authorized or even proscribed by state law, 42 USCA 1983.

3. No local rule of immunity unassociated with generally recognized common law immunity can stand as a defense in Civil Rights Act case 42, USCA 1983. The conduct of appellees is not associated with any generally recognized common law immunity.

4. In order to state a claim under 42, USCA 1983, facts must be alleged which show a defendant: (1) while acting under color of any statute, ordnance, regulation, custom, or usage of any state or territory; (2) subjects or causes to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. The complaint before this court clearly complies with this section. Citing RENNIE & LAUGHLEN INC. vs. CHRYSLER CROP. Cir. 242, 242, F.2d 208, 212 - 213, this court again announced that a motion to dismiss is viewed with disfavor in the Federal Courts.

It will be noted that the Respondents advance the same reasons urged by the Appellees in TENNEY vs. BRANDHOVE 31 US 367 and HOFFMAN vs. HOLDEN 268 F.2d 280 in which the

complaint had been dismissed as in the case before this court, namely that it should be held that the action was properly dismissed as the action in question were performed by them as police officers in the exercise of a discretionary function under which they have immunity from liability. By virtue of the provisions of the Civil Rights Act, this argument was rejected and both cases were distinguished on its facts in Cohen vs. Norris 300 F2d 24. Under the case of Monroe vs. Pape (1961) 365 US 167, 81 S CT 473, 5 L Ed 2492 (decided February 20, 1961) a commencement and prosecution of unfounded criminal prosecution under the facts set forth in appellant's complaint constitute not only malicious prosecution under the law, but violation of civil rights as well.

The Respondent also relies on California Government Code Section 821.6. It is contended by the Appellant that the abuse of process as set forth in his complaint does not come within the described immunity set forth in said government code section. Crews vs. Mays (1913) 165 C 493, 132 P 1032; Pimentel vs. Houk (1951) 101 CA 2d 884, 226 P2d 739 which cites 1 Ruling Case Law 103 in discussing abuse of process; Tranchina vs. Arcinas (1947) 78 CA 2d 522, 178 P2d; Restatement, Torts 682; 2 Witkin, Summary of California Law 1272 - 1274 (7th ed. 1960). The fact that the Federal Tort Claims Act expressly creates separate immunities for "malicious prosecution" and "abuse of process" supports the

view that 821.6 may not apply to cases not clearly in the malicious prosecution classification. 28 USC 2680(h). Since the provisions of the Federal Tort Claim Act were well known to the Law Revision Commission, limitations of California immunity to malicious prosecution apparently was deliberate.

PROCEEDINGS BEFORE GRAND JURY

The appellees failed to make a distinction between the conduct of a preliminary examination and proceedings before a Grand Jury. A preliminary examination is held after an individual has been charged with a crime to determine whether or not said accused shall be held to answer for the purpose of trial in the Superior Court. Presumably an investigation has been conducted and sufficient evidence obtained to warrant a complaint against a defendant, pursuant to which he is arrested and brought before a magistrate. Upon a plea of not guilty, the matter is then set for a preliminary examination. A Grand Jury is, on the other hand, inherently a body of inquisition empowered to make FULL and DILIGENT inquiry into public offenses triable within the county. IRWIN vs. MURPHY 129 CA 713, 19 P2d 292. In making such inquiry it is its duty to protect the citizen against unfounded accusation. In re TYLER 64 C 4341 P 884. It will be noted that a FULL and DILIGENT inquiry into public offenses must be made. It is a violation of the oath administered to the Grand Jury for the Grand Jury to fail to make a full and diligent inquiry and it is even more

reprehensible to withhold information which is extremely relevant and material, in order that an indictment may be obtained. Because of the conduct of the appellees, not only did the Grand Jury not make a full and diligent inquiry in the case of the appellant, but witnesses were brought before the Grand Jury who had full knowledge of all the facts. The appellees flagrantly abused their authority and misused their office by willfully, deliberately and systematically concealing from said Grand Jury facts known to said witnesses which pointed to appellants innocence and which would clearly negated any criminal intent on the part of the appellant. This abuse was compounded by the use of one Margaret Burke, who was incompetant as a witness, to establish a corpus delicti by the use of perjured testimony. In truth and in fact the appellees were guilty of subornation of perjury, suppression of testimony and obstruction of the proper administration of justice each of which is a felony under the laws of the state of California. The tactics used by appellees were willfully designed to mislead the Grand Jury by hampering and curtailing a full and diligent inquiry. The appearances of the District Attorney before the Grand Jury is not in a quasi-judicial capacity but in an investigative capacity. Theoretically, said District Attorney should be impartial. One of his duties is to see that a fair and impartial investigation is conducted. If there is any question about the influence the District Attorney wields over the Grand Jury, the following

quotations are offered from people who served on the Grand Jury of Alameda County in the year 1965 and 1966: "All directions come from the District Attorney. He and his assistants definitely lead the group." This particular juror declared that the remaining jurors "felt like stooges for months." When the said Grand Jury requested to speak to the Judge, the said jurors were allegedly told "we were told that he was too busy and that the District Attorney would go see him." A member of the 1966 Grand Jury felt they were "puppets or rubber stamps of the District Attorney." Any person who is investigated by the Grand Jury is at the complete mercy of the District Attorney. It is contended that the role of the District Attorney before a Grand Jury is an investigative role and not that of a quasi-judicial officer and that said appellees are not immune from civil liability. In ROBICHARD vs. RONAN 351 F.2d 533, the court stated:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity-integral relationship between his acts and the judicial process - ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? See Monroe v Pape, supra, 365 U.S. at 187, 81 S.Ct. 473; see also Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182, L.R.A.1916F, 399 (1916), cited in Yaselli, 12 F.2d at 405. To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.
>
> The prosecuting attorney may have numerous

roles. See Barrett, Police Practices and the Law-From Arrest to Charge, 50 Calif.L.Rev. 11, 16-24 (1962). The distinction between the roles may be significantly controlling, for as our court quite recently emphasized, 'prosecutors are not immune from suit under the Act simply as a matter of status wholly without regard to the nature of their conduct.' Corsican Productions v. Pitchess, 338 F.2d 441 (9th Cir. 1964). In that case, we cited, with approval, Lewis v. Brautigan, 227 F.2d 124, 55 A.L.R.2d 505 (5th Cir. 1955). In the Lewis case, a state's attorney, an official prosecutor, was sued, not for acts done in the course of his quasi-judicial role, but rather for acts done in his investigative role."

The District Attorney may, at all times, appear before the Grand Jury for the purpose of giving information and advice on matters cognizable by them and may interrogate witnesses whenever he thinks it necessary. California Penal Code # 925. It will be noted that the District Attorney does not appear as a quasi-judicial officer. He appears only in an investigative capacity to assist the Grand Jury in its investigation. Since the Grand Jury acts on matters brought before them by the District Attorney, the concealment of material facts can and does result in an indictment where an indictment would not have been found had the concealed facts been disclosed. A Grand Jury investigation is not a criminal proceeding. In Re McDonough 9 C2d 90, 68 P2d 9021.

In an effort to find out why the Grand Jury system is the focus of controversy in California, a survey was made requiring 1,500 miles of travel and interviewed with District Attorneys, Judges and Grand Jury Foremen. They

are the men who presumably must live with and make the system work. According to an article written by Mr. Paul James, Assistant City Editor of the San Diego Union for which he won an award from the State Bar of California, "the Grand Jury passed and circulated a resolution saying state law should be changed so juries have their own investigators, independant of district attorneys." The jurors, through their spokesman, presented a strong case, saying the quality of investigators would safeguard the privacy of individuals. They said if an investigator is answerable only to the Grand Jury, the jurors would have firmer control than under the present system of using district attorney's investigators.

THE CIVIL RIGHTS ACT

The United States Supreme Court in MONROE, et al, vs. PAPE 365 U.S. 167 reviewed at great length, including the legislative history, the rights and protection afforded to an individual under R.S. # 1979, 42 USC # 1983 and the construction to be placed on the provisions thereof which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It will be noted that the said section does not exclude district attorneys as alleged quasi-judicial officers. The United States Supreme Court declared that one who reads said statutes in their entirety, says that the present section had three aims: First, it might override certain kinds of state law. Second, it provided a remedy where state law was inadequate. Third, to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.

On page 184, the said United States Court, in an opinion written by Mr. Justice (later Chief Justice) Stone ruled, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Although there was a dissenting opinion, the rule as to the meaning of "under color of" state law was not questioned. That view of the meaning of the words "under color of" was reaffirmed in SCREWS vs. UNITED STATES. The said court continued in its opinion on page 187. The Court declared:

> "If the results of our construction of 'under color of' law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which 'under color of' law have recently been given, reinforce our conclusion that our prior decisions were correct on this matter of construction.

We conclude that the meaning given 'under color of' law in the CLASSIC case and in the SCREWS and WILLIAMS cases was the correct one; and we adhere to it.

In the SCREWS case, we dealt with a statute that imposed criminal penalties for acts 'willfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' 325 U.S., at 103. We do not think that gloss should be placed on # 1979 which we have here. The word 'willfully' does not appear in # 1979. Moreover, # 1979 provides a civil remedy, while in the SCREWS case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

Justice Frankfurter stated in MONROE vs. PAPE as follows:

"To show such violations, petitioners invoke primarily the Amendment's Due Process Clause. The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are 'implicit in the concept of ordered liberty,' are imposed by the Due Process Clause upon the States. PALKO vs. CONNECTICUT, 302 U.S. 319, 325. When we apply to their complaint that standard of a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' which has been the touchstone for this Court's enforcement of due process, the merit of this constitutional claim is evident."

In the case at bar, the conduct of the appellees, without any shadow of a doubt, offends the requirements of decency and fairness which are "implicit in the concept of ordered liberty," nor does the title of office, quasi-judicial or even judicial of itself, immunize the appellee from responsibility for unlawful actions which cannot be said to constitute an integral part of the judicial process.

ROBICHARD vs. RONAN 351 F.2d 533 (1965), pg. 537.

The first amended complaint of the appellant is based primarily on misuse of office and abuse of process in that, as alleged paragraph IX, "Under color and by misuse of the office of District Attorney of Alameda County, said J. Frank Coakley in collusion with the said Assistant District Attorney Lowell Jensen and Inspector C. Herbert, and others, knowingly and willfully presented to the Grand Jury on or about February 18, 1965, perjured testimony for the designed purpose of obtaining an indictment against plaintiff and willfully and by design did not present a full and true picture of all facts before said Grand Jury, which facts were available to and within the knowledge of said named officials." CT p. 10, ll 4-9. Paragraphs XI, CT 10, ll 19-32, XII, CT. 11, ll 1-8, and XV, CT. 11, ll 19-26 specifically set forth material facts known to the District Attorney which were concealed from the Grand Jury. Even a casual observation leads an unprejudiced mind to one conclusion that the withholding of said information was designed to mislead the Grand Jury and assure that the said Grand Jury would bring in an indictment. By this course of conduct, the appellees made certain that the integrity of the appellant would be forever besmirched and any political ambition stifled. It is a well accepted fact that even an acquittal will not remove the stigma of an indictment. Paragraph XVII, CT. 12, ll 4-8 clearly demonstrated that

appellee did not receive a speedy trial in violation of his constitutional rights as guaranteed by the 6th and 14th Amendments of the United States Constitution.

It is contended by the appellant that the appellees stripped themselves of any possible immunity by virtue of their conduct as hereinabove set forth that a cause of action has been stated against the said appellees and that this action should be remanded to the United States District Court for trial on its merits.

Respectively submitted,

Benjamin F. Marlowe
In Propria Persona

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Benjamin F. Marlowe

No. 21,981

United States Court of Appeals

For the Ninth Circuit

BENJAMIN F. MARLOWE,
Appellant,

vs.

J. FRANK COAKLEY, LOWELL JENSEN and C. HERBERT,
Appellees.

APPELLEES' BRIEF

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No. 21,981

United States Court of Appeals

For the Ninth Circuit

BENJAMIN F. MARLOWE,
Appellant,

vs.

J. FRANK COAKLEY, LOWELL JENSEN and C. HERBERT,
Appellees.

APPELLEES' BRIEF

STATEMENT OF FACTS

This is an appeal from an order of dismissal (CT page 31) made after hearing on a duly noticed motion (CT page 17).

The essence of appellant's allegations is that appellees "presented to the Grand Jury . . . perjured testimony" and "did not present a full and true picture of all facts before said Grand Jury." (CT page 10, lines 7-8, 10-11) More specifically, appellant alleges that appellees "permitted Margaret Buerk to falsely testify" before the Grand Jury and that "the testimony given by said Margaret Buerk was false and malicious." (CT page 10, lines 24, 28-29) These allegations are repeated in somewhat different form elsewhere in the complaint: "did not bring forth from

said witnesses before the said Grand Jury the fact within the knowledge of said witnesses" (CT page 11, lines 5-6); "wilfully and deliberately suppressed evidence within their knowledge." (CT page 11, lines 22-23)[1]

Although not specifically so stated in the order of dismissal, the dismissal was undoubtedly based on the immunity of appellees insofar as it pertains to the first and second causes of action. These were the only grounds argued in appellees' reasons and authorities (CT pages 19-22) and argued at the hearing of the motion.[2]

The grounds argued for dismissal as to the third alleged cause of action were lack of jurisdiction in the United States District Court (CT pages 22-23) and failure to state facts sufficient to constitute a claim (CT page 23).

ISSUE

The sole issue before this Court is whether, under the circumstances of this case, appellees are immune from liability.[3]

---

[1]The alleged second cause of action is essentially the same as the alleged first cause of action with a substitution of allegations of "gross negligence" in place of allegations of "wilfull and deliberate" conduct. (CT page 13, lines 10-21)

The alleged third cause of action, against appellee J. Frank Coakley only, seems to be basically an attempt to allege slander. It apparently has no relationship to the first two alleged causes of action except the identity of one appellee. (See CT pages 14-15)

[2]Contrary to appellant's assertion (Appellant's Opening Brief, page 7, lines 15-19), appellees have not relied on and do not now rely on Section 821.6 of the California Government Code.

[3]Appellant does not argue in his opening brief that the dismissal of the alleged third cause of action was improper.

APPELLEES ARE IMMUNE

The Supreme Court held in *Tenney v. Brandhove,* 341 U.S. 367 (1951) that the traditional common law immunities were not abrogated by the Civil Rights Act. The immunity of prosecuting officials is well established throughout the federal court system. The rationale of this immunity is well expressed by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.

> In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .
>
> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise the power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. [*Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949) quoted with approval in *Barr v. Matteo,* 360 U.S. 564, 571-72 (1959)]

In this Circuit, the doctrine of immunity of prosecuting officials has been recognized in *Agnew v. Moody,* 330 F.2d 868 (9th Cir 1964), in *Harmon v. Superior Court,* 329 F.2d 154 (9th Cir 1964) and in *Sires v. Cole,* 320 F.2d 877 (9th Cir 1963).

Appellant argues that the cases establishing immunity of prosecuting officials "are clearly distinguishable on [their] facts from the case at bar." (Appellant's Opening Brief, page 5, lines 5-6) Appellant does not, however, distinguish them.

Appellant apparently argues that *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir 1965) is controlling. The *Robichaud* case involved allegations that the prosecuting official therein involved, among other things, participated in a wrongful attempt to coerce a confession from the plaintiff. In the *Robichaud* case, the defendant was denied immunity because the defendant had allegedly participated in acts beyond his quasi-judicial capacity. "If he acts in the role of a policeman, then why should he not be liable, as is the policeman . . .?" (351 F.2d at 536)

The *Robichaud* case did not overrule any of the former cases holding that "prosecuting attorneys, in acting as quasi-judicial officers, should enjoy the same immunity from civil liability as that which protects a judge." (351 F.2d at 536) It merely held that the immunity does not extend to acts which are not within the quasi-judicial function. (351 F.2d 537-38)

Robichaud v. Ronan has no application to this case. In this case, the complaint shows that in doing the acts alleged, appellees were acting in a quasi-judicial role. All of the acts complained of were done in pursuance of appellees' duty to assist the grand jury in its inquiry and, if an indictment is returned, to prosecute the person against whom the indictment is brought. The allegations of the complaint (CT pages 8-13) make it clear that appellees in no way abandoned their quasi-judicial function.

Appellant's primary theory seems to be that his allegations of improper intent and malice negate appellees' immunity. Appellant's unfounded allegations

cannot aid him, however, in his attempt to bring the alleged acts of appellees out of the area of quasi-judicial action.

> . . . it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation [that the official's act must have been within the scope of his powers] without defeating the whole doctrine. [*Barr v. Matteo,* 315 U.S. 564, 572 (1959); *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir 1949)]
>
> The claim of an unworthy purpose does not destroy the privilege. [*Tenney v. Brandhove,* 341 U.S. 367, 377 (1951)]

CONCLUSION

The acts alleged were clearly and uncontrovertibly within the quasi-judicial function of appellees. The order of dismissal should be affirmed.

Dated, San Francisco, California,
November 29, 1967.

Respectfully submitted,
HAGAR, CROSBY & ROSSON,
By EDWIN A. HEAFEY, JR.,
Attorneys for Appellees.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edwin A. Heafey, Jr.,
Attorney.

No. 21,981

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN F. MARLOWE,

APPELLANT.

v.

J. FRANK COAKLEY, et al.,

APPELLEES.

PETITION FOR NEW HEARING

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FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

BENJAMIN F. MARLOWE, Appellant, vs. J. FRANK COAKLEY, et al., Appellees.	NO. 21,981

PETITION FOR A REHEARING

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant respectfully petitions for a rehearing in the above entitled case on the following grounds:

I. The Court's decision completely avoided the constitutional issues raised by Appellant.

II. The Court, by its decision, placed its stamp of approval that any District Attorney can use perjury knowingly solely for the purpose of obtaining an indictment.

III. The Court's decision did not consider the function

of the District Attorney before a grand jury as set forth in Appellant's Brief, to wit: that the function of the District Attorney before a grand jury is investigatory, and not even remotely quasi-judicial in nature.

ARGUMENT

The Appellant refers to and by such reference incorporates herein Appellant's Brief originally submitted to the above Court. If this Court can, after reading the authorities cited in said Brief and the arguments made before this Court by the Appellant take the position that a district attorney can with immunity knowingly present perjurious evidence to a grand jury solely for the purpose of obtaining an indictment or information, this Court in effect puts its stamp of approval on such conduct. No law, California or otherwise, authorizes a district attorney to present perjured information to the grand jury knowing said evidence is perjurious. Appellant specifically stated in his complaint that the said district attorney knowingly presented false information to the grand jury and that said information was given under oath, making the same perjury. In the State of California the use of perjury in such a fasion is a felony. It would appear that the irreparable damage caused to any professional person under such circumstances need not require argument.

It is the contention of the Appellant that if an individual citizens, professional or otherwise, can be abused by such acts on the part of a district attorney, then the

Constitution and more particularly the Bill of Rights is reduced to a meaningless document and no citizen is safe from abuse of process as set forth by the Appellant in his complaint. To permit such conduct on the part of any law enforcement officer, district attorney or otherwise, is to encourage such conduct on the part of unscrupulous district attorneys. Appellant can prove without any shadow of a doubt that the said District Attorney J. Frank Coakley is unscrupulous in the full sense of the term and will not hesitate to avenge himself against an individual, professional or otherwise, by abusing the judicial processes to destroy said individual and his family.

To permit the conduct complained of by Appellant in his complaint is to spawn the seeds of anarchism and dictatorship. The very purpose of the Constitution and Bill of Rights predicated upon the background of abuses which motivated the writing of said Constitution and Bill of Rights was and is to protect citizens from the very conduct complained of by the Appellant.

In the early days of our history, men of honor chose the field of honor to settle much less serious complaints. No man has the moral or legal right to resort to such methods. We have Courts of Law. The very least any citizen can expect is protection from unscrupulous district attorneys or any other unscrupulous individual who has the power to destroy an individual and his family under the guise of carrying out his

duties. This protection is afforded by the Constitution. The only question that remains is -- will the Courts, under the authority of the United States Constitution and the Bill of Rights, protect an individual from said conduct?

The Court cited California Penal Code Sec. 925 (West 1956); California Government Code Sec. 26501 (West 1955) as support for its position that a California district attorney's presentation of evidence to a grand jury is clearly within the scope of his duty to advise and present information to the grand jury as authorized by California law. The Appellant at no time questioned the right of a district attorney to present evidence to a grand jury under the said cited authorities. Appellant specifically made it clear and unequivocal that no district attorney is authorized by any California law to knowingly present perjured testimony solely for the purpose of obtaining an indictment as alleged in the complaint.

the Constitution of the United States, Justice Black's opinion on Bill of Rights

The Appellant respectfully requests this Court to reconsider its decision rendered in the above matter, as well as a reconsideration of the consequences of giving a district attorney unbridled powers which, in effect, flaunts the Bill of Rights of the United States Constitution.

Respectfully submitted,

Dated: December 2, 1968.

/s/ Benjamin F. Marlowe

BENJAMIN F. MARLOWE
Appellant

Nos. 21982 and 21982A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STANFORD GOODMAN, doing business as LINDO ENGINEERING, also known as T. STANFORD GOODMAN, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of JOHN P. RINEER, doing business as RINEER OIL SURFACING,

Appellee.

RECEIVED
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T. STANFORD GOODMAN, doing business as LINDO ENGINEERING, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of TURLOCK ROCK COMPANY, a corporation,

Appellee.

FILED
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Appeal from the United States District Court
For the Eastern District of California

APPELLEE'S BRIEF

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JOHN P. RINEER

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Nos. 21982 and 21982A

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Appellee.

T. STANFORD GOODMAN, doing business as LINDO ENGINEERING, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA to the use of TURLOCK ROCK COMPANY, a corporation,

Appellee.

Appeal from the United States District Court

For the Eastern District of California

APPELLEE'S BRIEF

Statement of the Case.

This is an appeal from a judgment of the Federal District Court for the Eastern District of California wherein Appellee Rineer sued Appellants Goodman and Hartford on bond under Miller Act, Title 40, §270(a)-(d), jurisdiction conferred under Title 28, §1352, for labor and materials, by virtue of breach of contract of guarantee that certain materials to be supplied by third party would be according to specifications.

Statement of Facts.

Prior to entering into a written contract scrivenered by Goodman and after the written proposal, Goodman and Rineer conferred on materials, Goodman advising that he was able to get a better price on sand and wanted to take advantage of the same, Rineer advising assent with the specification sand had to be in specification, assented to by Goodman. [Rep. Tr. P. 78, Lines 23-25 and P. 79, Lines 1-21; Rep. Tr. P. 153, Lines 22-25 and P. 154, Lines 1-24; Rep. Tr. P. 258, Lines 13-20]. The sand was not in specification. [Plaintiff's exhibit #2] [Rep. Tr. P. 42, Lines 18-25 and P. 43, Lines 1-3].

Summary of Argument.

I.

The sufficiency of Complaint, motion conforming pleadings to the evidence having been granted, cannot properly be raised on appeal.

II.

The trial court's findings cannot be set aside unless they are shown to be clearly erroneous.

III.

The trial court need not make a finding on every factical issue raised.

IV.

The asserted authorities of Appellant are clearly distinguishable or are not applicable to the case at hand.

V.

The trial court's findings of fact support the judgment as granted.

Argument.

I.

THE SUFFICIENCY OF COMPLAINT, MOTION CONFORMING PLEADINGS TO THE EVIDENCE HAVING BEEN GRANTED, CANNOT PROPERLY BE RAISED ON APPEAL.

In this matter, a motion for amendment of the pleadings to conform to the evidence was made [Tr. P. 63]. The same was granted [Tr. P. 98, Lines 30-31]. Such an amendment relates back to the date of the original pleadings under Rule 15(c), F.R.Civ.P., 28 U.S.C.A. This being the case, it is difficult to understand how the claim on the part of Appellants

raises an appealable issue, as there could be no prejudice and there were no objections to the admission of evidence on the grounds that the same were beyong the scope of the pleadings, and Rule 12(h), F.R.Civ.P., 28 U.S.C.A. indicates that Rule 15(b), F.R.Civ.P., 28 U.S.C.A. is the proper procedure to follow if objections or defenses are raised at the time of trial. In this case there were no objections to proceeding with trial and no objection was made to the motion to have pleadings conformed to the proof, and it is therefore respectfully concluded that there is no appealable issue with respect to the pleadings.

II.

THE TRIAL COURT'S FINDINGS CANNOT BE SET ASIDE UNLESS THEY ARE SHOWN TO BE CLEARLY ERRONEOUS.

The above stated rule has been codified in Rule 52(a), F.R.Civ.P., 28 U.S.C.A., wherein it is stated:

"...findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses..."

The trial court found that the Appellant and Appellee entered into an agreement for the supplying of labor and certain materials [Tr.P. 102, Lines 17-19], that by virtue of the said contract, labor and materials were supplied [Tr.P. 102, Lines 21-28], that the contract required the Appellee Rineer to obtain sand from Appellee Turlock Rock Company, and that the Appellant Goodman guaranteed the sand to be according to specification, and that the sand did not meet specification [Tr.P. 103, Lines 9-14].

With the exception of the attack by Appellant upon the finding that the Appellant Goodman guaranteed the sand would be according to specification, Appellants made no specification of error on these findings. With respect to the attack on the said finding, it is respectfully submitted that the testimony of Myron Hulett substantiates the guarantee aspect of the court's finding wherein [Rep. Tr. P. 153, Lines 22-25 and P. 154, Lines 1-24] it is stated:

"Q Will you tell us in substance what those conversations were?

A There were two items of discussion. One was the obtaining of the aggregate, the sand. I believe it was Jay Forrest who told us

-- well, he asked us, "Have you got a price on sand yet?" and we told him yes and he asked, "What kind of a price do you have?" and we told him $1.50 and tax at plant. He said, "Who is the supplier you got the price from?" and we said Turlock Rock. He said, "That's fine. We're buying other materials from Turlock Rock, but we believe we can do better than that and if we can do better than that, are you agreeable if we furnish the sand and we'll keep the difference in the cost what we have to pay and what you figure as your cost?", and it made no difference to us, so we said yes, that would be all right.

The other item of discussion was on the price we had quoted -- as I remember we quoted 21.5 cents a gallon on the oil that was to be spread and, golly, I don't know any other word to use except they jewed us down to 20 and a quarter cents a gallon.

And on the rock we had a certain figure per ton and that was taken care of by them furnishing the materials, so we had a negotiation after our proposal and before they drew up a contract and sent it to us.

In our conversation on the aggregate, they were going to furnish it, we asked that the protection be put in the contract for us, that the material had to meet specifications and they said they would do it that way."

and the testimony of John Rineer [Rep. Tr. P. 78, Lines 23-25 and P. 79, Lines 1-21] as follows:

"Q And what was said by Lindo Engineering concerning this?

A Well, I believe it was Jay Forrest that said that they wanted to put it in the contract that the sand be placed by Turlock Rock and that it would be a guaranteed price of $1.30, but --

Q Did you agree to that?

A We agreed to it as long as it was in spec and that's the way it's written in the contract.

Q What do you mean by "as long as it was in spec"?

A That it would meet Government specifications as far as applying it on the job.

Q Who was present at this last discussion you had?

A Jay Forrest and Mike Hulett and myself.

Q And where was that?

A At our office at 120 South Orange, Fullerton.

Q And approximately what date was it?

A It was prior to the signing of the contract, probably two or three weeks, something to that effect.

Q And did you advise them that you wanted this in the contract?

A Yes.

Q And they complied with that request?

A Yes."

and as verified by the Defendant, who was also the scrivener, as found in his testimony, [Rep.Tr.P. 258, Lines 13-20] as follows:

"A Yes; we had some discussion on that and I told him once again that the material had been submitted and that the material had been approved and that we had been quoted a price of $1.30 and he said, well, he'd gotten a price of a buck-fifty and I said, "Well, I'm certain they will sell it for $1.30 and I'll guarantee the price, that I'd guarantee that and he said, "Well, I want it according to specifications in the contract', so I did."

The special provisions of the written part of the contract are typewritten as opposed to printed [Pl. Exhibit Nos. 4 and 5].

And with respect to Appellant's assertion that the sand was according to specification, it is submitted:

1) specification itself was clear and concise [Pl. Exhibit No. 2]
2) there was testimony from the man who wrote the specification for the government stating that the sand was not in specification. [Rep.Tr.P. 42, Lines 14-25, P. 43, Lines 1-3] [Pl. Exhibit Nos. 4 and 5] [See Appendix P. 101].

It is therefore submitted that an issue of fact was resolved in favor of the plaintiff Appellee John P. Rineer on the finding of guarantee and there is ample support in the record for the trial court's finding.

III.

THE TRIAL COURT NEED NOT MAKE A FINDING ON EVERY FACTUAL ISSUE RAISED.

In Carr v. Yokohama Specie Bank, Limited, of San Francisco, C.A. Cal. 1953, 200 F.2d 251, it was held: in construing Rule 52, F.R.Civ.P.,

28 U.S.C.A. that the rule does not require the court to make findings on all facts presented or to make detailed evidenciary findings, but where findings were sufficient to support ultimate conclusion of court, they are sufficient, and it was not necessary for the court to make findings asserting the negative of each issue raised, but it was held sufficient if special affirmative facts found by the court construed as a whole negated each reviewed contention, and that the ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertain to issues so as to provide a basis for decision.

In Travelers Insurance Company v. Dunn, C.A.Tex. 1956, 228 F. 2d 629, the rule was stated that the findings of the trial court are to be liberally construed in support of the judgment.

In Weber v. McKee, C.A. Tex. 1954, 215 F.2d 447, it was again asserted in construing the said rule that the trial court need not make findings on all facts presented nor detailed evidenciary findings, nor assert the negative of each issue of fact raised, and that the ultimate test as to adequacy of findings is whether the findings are sufficiently comprehensive and pertain to issues so that as to provide a basis for decision. Clearly, in this case, the court felt that the Defendant Appellant Goodman, in guaranteeing the sand to be in specification, made moot the responsibility for selection.

IV.

THE ASSERTED AUTHORITIES OF APPELLANT ARE CLEARLY DISTINGUISHABLE OR ARE NOT APPLICABLE TO THE CASE AT HAND.

The cases of Jefferson Construction Co. vs. U. S. ex rel Bacon, 1st Circuit (1960) 283 F. 2d 265, Cert. denied (1961) 365 U.S. 835 and Southern Painting vs. U.S. ex rel Silver, 10 Circuit (1955) 222 F. 2d 431, are not applicable inasmuch as there was in fact a material breach of the contract before the court, as the court found that the defendant Goodman guaranteed the sand to be in specification, that it was in fact not in specification, and that this failure caused great difficulty.

The cases of De La Falaise vs. Gaumont Pictures (1940) 103 P. 2d 447, 39 Cal. App. 2d 461 and Lewis Publishing Co. vs. Henderson (1930) 284 P. 713, 103 Cal.App. 425 are not applicable inasmuch as there was no finding nor issue raised by the answer with respect to conditions

precedent, and, of course, a party defendant cannot use a condition precedent as a defense where he himself is the cause of the failure of the condition, for which assertion there is a wealth of authority, including: 12 Cal. Jur. 2d, Contracts, §232, citing Morrison v. Sycamore Canyon Gravel Company, 102 C.A. 536, 238 P. 84; Overton v. Vita-Food Corp., 94 C.A. 2d 367, 210 P. 2d 757; Richardson v. Walter Land Co., 118 C.A. 2d 459, 258 P. 2d 42; and 1 Witkin Summary, §271.

The cases of James vs. Haley, 212 Cal. 142, 297 P. 920 and Mason vs. Ennes, 172 Cal. App. 2d 99, 342 P. 2d 79, can be distinguished inasmuch as there was no material issue not covered by the findings in the case before the court, for the finding of guarantee and the breach of the same relieved Appellee Rineer of further duty and by negative reference refutes Appellants contention of Appellee Rineer's responsibility for selection.

V.

THE TRIAL COURT'S FINDINGS OF FACT SUPPORT THE JUDGMENT AS GRANTED.

There is no dispute as to the findings with respect to jurisdiction under the Miller Act. The finding that Appellant Goodman was the general contractor under the general contract, that the Appellant insurance carrier was the bonding company under bond required under the general contract, nor that a contract existed as between Appellant Goodman and Appellee Rineer, nor that materials and labor were furnished in accordance with the findings. There is ample evidence to support the court's finding that the Defendant Appellant guaranteed the sand to be in specification, that it was not in specification, and that great difficulty was created thereby. That is, a duty existed from the Appellants to the Appellee John P. Rineer, created by contract and by statutory authority. There was a breach of that duty by virtue of the Appellant Goodman's failure to make payment and the failure of his guarantee; that there was damage to the Appellee John P. Rineer by virtue of his having supplied materials and labor, and therefore, the Court was right and justified in granting judgment in favor of the Appellee John P. Rineer.

Conclusion.

The trial court's findings of fact were sufficient to support the

ultimate conclusion of the court and the judgment of the court was properly sufficient upon the findings as submitted, and this honorable court should affirm that judgment as entered.

Respectfully submitted,
MURPHY AND WARNISHER

By Richard J. Murphy
Attorneys for Plaintiff-Appellee
United States of America to the use of
John P. Rineer

Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MURPHY AND WARNISHER

By Richard J. Murphy

APPENDIX

Direct examination of William Bruce:

" ***

Q Now, with respect to that specification, will you familiarize yourself with the specification concerning moisture content in the aggregate?

A Yes, sir.

Q From your own observation of the aggregate that you saw on the job, would you state whether or not the aggregate, as utilized, was within this specification?

MR. MARSH: May I object, your Honor, and ask that counsel to lay a better foundation as to time.

BY MR. MURPHY:

Q With respect to time of delivery on the job.

A When the material first was dumped on the job, it was, in our opinion, excessively wet and would not meet the requirement of the specification to be sufficiently dry to properly spread.

*** "

Nos. 21,982 and 21,982-A

United States Court of Appeals

For the Ninth Circuit

T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., *Appellants,* vs. UNITED STATES OF AMERICA, ex rel. JOHN P. RINEER, d/b/a RINEER OIL SURFACING, *Appellee.*	No. 21,982
T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., *Appellants,* vs. UNITED STATES OF AMERICA, ex rel. TURLOCK ROCK COMPANY, *Appellee.*	No. 21,982-A

Appeal from the United States District Court for the Eastern District of California

BRIEF OF APPELLEE TURLOCK ROCK COMPANY

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Appeal from the United States District Court for the Eastern District of California

BRIEF OF APPELLEE TURLOCK ROCK COMPANY

This brief is on behalf of Turlock Rock Company and in answer to the opening brief of T. Stanford Goodman, d/b/a Lindo Engineering, et al.

QUESTIONS INVOLVED

The appellant raises only two factual matters against the appellee Turlock Rock Company, both of which appear on page 19 of appellant's opening brief. Appellant contends:

1. When Rineer rejected the $1.30 per ton sand, Turlock Rock Company should have informed Goodman of the change.

2. Since the $1.50 sand was harder to handle than the $1.30 sand, Turlock Rock Company should be assessed with the additional costs incurred by Goodman.

ARGUMENT

1. THE FINDINGS OF THE DISTRICT COURT ON THE TWO QUESTIONS PRESENTED BY APPELLANT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The lower Court found

> "That Turlock Rock Company did not agree to provide sand without moisture and both said prime contractor and sub-contractor continued to pick up the sand at the Turlock Rock Company plant knowing it to be wet." (From Findings, C. T. 119, lines 8-11.)

Originally the parties had been talking with Turlock Rock Company about sand which was understood to be "concrete sand." Goodman always contended that "concrete sand" was suitable for the job, but the final order was for "plaster sand." Turlock Rock Company did not have a stockpile of this and had to

start making it. Since the sand was taken immediately from the river, there was moisture in it and both Rineer and Goodman were warned that there would be a moisture problem.

---

2. TURLOCK ROCK COMPANY WAS NOT OBLIGATED TO MEET CONTRACT SPECIFICATIONS—IT ONLY FURNISHED WHAT THE CONTRACTORS SELECTED.

The cross-complaint by Goodman against Turlock Rock Co. in paragraph V (C. T. 21) alleges that "cross-defendants had specially prepared the sand according to specifications provided by the Air Force."

The only problem was in the moisture which resulted in some spreading difficulty. The moisture problem was known to both Rineer and Goodman before the job started. (R. T. 83, 84, 217 and 218.)

Goodman was at the job when it started and knew what the problem was and knew what sand was being used. (R. T. 261, 262.) Despite this, he continued using the same sand when he took over the job. (R. T. 273, lines 9 to 16.)

It is thus unimportant whether Rineer or Goodman was responsible for selection of the sand, because both used it.

Goodman did not have to continue using the wet sand when he took over the job (R. T. 275, lines 8 to 13)—he was free to change to dry sand—but, knowing all the problems, he continued to order and pick up the wet sand from Turlock Rock Company.

There was no contract between Goodman or Rineer and Turlock Rock Company whereby Goodman had ordered a specific amount of sand or was obligated to take any particular sand or to take any sand at all. Turlock Rock Company was simply in the position of a merchant. It had sand or could make sand, and there were established prices for the various kinds of sand.

Turlock Rock Company did not deliver the sand, but it was simply picked up by the party using it. Both Rineer and Goodman could have quit taking sand at any time.

---

3. GOODMAN HAS ADMITTED OWING TURLOCK ROCK COMPANY, AND HAS MADE PARTIAL PAYMENTS.

The sand was only part of the material furnished by Turlock Rock Company. Exhibit No. 6 shows that 10,496.55 tons of base rock was furnished. The amount and price for this are not in dispute. This exhibit also shows that 2721.45 tons of sand was furnished. There is no dispute about the amount of the sand.

There was also equipment rental of $462.00, and an interest charge of $47.60. No charge was made for use of scoop to air out the sand. (R. T. 221.)

The total amount owing for all of these items to Turlock Rock Company is $17,130.88.

Goodman had paid $10,106.20 plus $427.00 or a total of $10,533.20, leaving an unpaid amount of $6597.68 bearing interest from November 5, 1965. (R. T. 142 to 147.)

Exhibit No. 9, a letter from Goodman dated March 9, 1966, says in part "legally I am responsible for the payment anyway. I am sorry that Turlock Rock Company is involved in this dispute between Rineer Co. and myself." This letter enclosed a check for $427.00 as interest (but which was applied to principal).

On August 27, 1965, Goodman sent a cashier's check for $848.64 payable to Turlock Rock Company and Rineer Oil Co. (Exhibit 10.) Rineer Oil Co., or its counsel, apparently still has possession of this check.

Further, about December 24, 1965, Goodman sent a check to Turlock Rock Company for $4582.23 (Exhibit 12), but the endorsement on the check made it unacceptable because it did not clear the account.

---

4. THE PARTIES KNEW THE PRICE OF PLASTER SAND WAS $1.50 A TON.

Turlock Rock Company quoted to Goodman a price of $1.30 for concrete sand and $1.50 for plaster sand. (R. T. 215, lines 20 to 25.)

Rineer testified that he had gotten the price of $1.50 per ton from Turlock Rock Company and that he informed Goodman of this price. (R. T. 160, lines 10 to 15.)

Goodman knew that the price was $1.50 a ton. (R. T. 185, lines 18 to 21.) In R. T. 200, lines 17 to 25, Goodman testified:

"Further, I would like to draw your attention to the exhibit and the words, 'any reduction in the sand price will reduce Rineer Oil's contract by an equal amount'; what did you understand that to mean?

A. I understand that to have meant that if Turlock Rock—excuse me, that if Rineer Oil was to have to pay $1.50, I was responsible for the 20 cents difference, so by the same virtue, if the thing was reduced through some reason, I wanted the advantage of it."

Also at page 259, lines 15 to 19, Goodman said:

"In other words, I felt that he and I were stipulating to the price of $1.30. If the rate changed I would get the advantage of the lower price and protect him from the disadvantage of having a higher price."

Goodman's testimony at R. T. 183, lines 11 to 15, substantiated Mr. Frank's testimony that the $1.30 price applied only to "concrete sand".

"I'm not altogether certain but what the $1.30 sand would have worked. I never changed the source.

Q. Well, it wasn't to specification was it?

A. I have no proof that it wasn't. No one asked us to resubmit."

In Goodman's letter (Exhibit 10) he stated a price of $1.50 a ton.

CONCLUSION

Turlock Rock Company, as far as it was concerned, had its dealings with Goodman, he originally ordered the materials, the United States paid *him* for the job and materials, and he is the one who is obligated to pay for the materials. He was not obligated to take the materials, but he did and he has refused to pay a part of the balance owing, though he has admitted an obligation.

It is respectfully submitted that judgment in favor of Turlock Rock Company should be affirmed.

Dated, Turlock, California,
December 11, 1967.

Respectfully submitted,
GILBERT MOODY,
H. E. GLEASON,
By GILBERT MOODY,
Attorneys for Appellee
Turlock Rock Company.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GILBERT MOODY,
Attorney for Appellee
Turlock Rock Company.

Nos. 21982 and 21982A

United States Court of Appeals

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Appeal From the United States District Court
For the Eastern District of California

APPELLANT'S OPENING BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., Appellant, vs. UNITED STATES OF AMERICA ex rel JOHN P. RINEER, d/b/a RINEER OIL SURFACING, Appellee.	)	No. 21982 - Civil
T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., Appellant, vs. UNITED STATES OF AMERICA ex rel TURLOCK ROCK COMPANY, Appellee.	)	No. 21982 - A - Civil

APPELLANT'S OPENING BRIEF

TO THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

STATEMENT OF THE CASE

Civil Action No. 21982 is an appeal from an action in the United States District Court for the Eastern District of California in which JOHN P. RINEER

(hereinafter referred to as "RINEER" for the sake of brevity and convenience) brought an action on a bond executed under the Miller Act (Title 40, Section 270 (a), (b), (c), (d) and (e) for materials and labor supplied by Rineer under a written contract agreement with T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING (hereinafter referred to as "GOODMAN" for the sake of brevity and convenience). Said written contract is a Subcontract Agreement dated July 16, 1965. GOODMAN had a prime contract with the United States Air Force at the Castle Air Force Base near Turlock, California. The Miller Act Bond was executed by appellant HARTFORD ACCIDENT AND INDEMNITY COMPANY (hereinafter referred to as "HARTFORD" for the sake of brevity and convenience.)

Civil Action No. 21982-A is an appeal from an action also under the Miller Act brought by the TURLOCK ROCK COMPANY (hereinafter referred to as "TURLOCK" for the sake of brevity and convenience) against GOODMAN and HARTFORD for materials furnished by TURLOCK to RINEER and GOODMAN under an oral agreement also for use at the Castle Air Force Base.

The RINEER case and the TURLOCK case were consolidated for trial by stipulation. The cases came on for trial, the court sitting without a jury, in the United States District Court for the Eastern District of California, on January 11 and 12, 1967.

Judgment was entered against the appellant and in favor of both appellees on May 8, 1967, and May 23, 1967, and this appeal followed in due course.

FACTS

On April 22, 1965, GOODMAN, as a prime contractor, entered into a written contract with the United States, whereby GOODMAN was to effect the repair of a shoulder, ground work and certain other work at the Castle Air Force Base in California. Under this prime contract, HARTFORD executed a surety bond in proper amount to insure payment of labor and materials pursuant to the MILLER Act requirements.

On May 24, 1965, a proposal to sub-contract was made by RINEER to GOODMAN in which RINEER stated he was an experienced contractor in the type of work needed under the contract. (Deft. Exhibit "E", Rep. Tr., pp. 112, 113).

On July 16, a formal written subcontract was entered into between RINEER and GOODMAN (Plf. Exhibit 4 & 5, Rep. Tr., p. 76) a section of this subcontract and which is most pertinent to the issues raised in this appeal reads as follows:

> "Sand to be supplied by Turlock Rock Company at the plant at $1.30 per ton, plus sales tax according to specificiations. Any reduction in the sand price, will reduce RINEER'S oil contract by an equal amount."

A representative of the United States had gone to the TURLOCK ROCK COMPANY before the subcontract between RINEER and GOODMAN had been executed; and this representative had approved a certain type of sand to be used on the contract job. This type of sand is called "concrete" sand. TURLOCK had plenty of concrete sand on hand; it was dry and would have caused no trouble on the job for RINEER. (Rep. Tr., pp. 133, 137, 294).

Before RINEER started his work under the subcontract, he visited the TURLOCK ROCK COMPANY'S yard for the purpose of inspecting the materials he was to use. RINEER decided that the government-approved "concrete" sand would not do since, in his opinion, the concrete sand would not meet the specifications on the job. RINEER arbitrarily changed the type of sand from "concrete" sand to "plaster" sand. (Rep. Tr., p. 133).

RINEER made this decision knowing that TURLOCK would have trouble making the plaster sand in the quantities needed and with a moisture problem. (Rep. Tr., pp. 83, 133, 134).

RINEER personally ordered the plaster sand from TURLOCK and started work on July 19, 1965. (Rep. Tr., p. 101).

RINEER immediately had difficulty in applying the sand he received from TURLOCK because of the wetness of the sand. (Rep. Tr., pp. 80, 81).

RINEER complained to TURLOCK about the wetness of the sand on the first day of delivery, and TURLOCK sent out some equipment to aerate it. RINEER continued to have troubles on the job. (Rep. Tr., p. 84).

The Government complained to GOODMAN in writing on July 30, 1965, concerning the competency of RINEER; (Deft. Exhibit "A", Rep. Tr., pp. 22, 24). and on August 4, 1965, issued a "stop order" to GOODMAN which stopped the work under the prime contract because RINEER was not furnishing the work product which the Government expected. (Deft. Exhibit "B", Rep. Tr., pp. 26, 27).

On August 3, 1965, RINEER quit the job (at which time there were approximately 20% of RINEER'S job completed); giving as an excuse that there was too

much moisture in the sand to work.

On August 26, 1965, the Government ordered GOODMAN in writing to resume the work under the contract. (Deft. Exhibit "C", Rep. Tr., p. 28).

On August 30, 1965, GOODMAN orally ordered RINEER to return to the job site and complete the job. RINEER refused to do so since the same type of sand was available as RINEER had used before unsuccessfully. On September 17, 1965, GOODMAN gave a written 48 hour notice ordering RINEER to get back on the job and complete the contract. (Deft. Exhibit "F", Rep. Tr., p. 117).

RINEER answered the 48 hour notice by refusing to return to work unless the sand was changed and only if GOODMAN paid RINEER certain "damages". (Deft. Exhibit "G", Rep. Tr., pp. 118, 119).

On September 20, 1965, GOODMAN wrote RINEER a letter in which GOODMAN explained that the sand was not unusable, but merely more difficult to use because of the moisture in the sand. (Deft. Exhibit "H", Rep. Tr., pp. 120, 121).

On September 28, 1965, GOODMAN wrote RINEER a letter telling RINEER that GOODMAN was going to complete RINEER'S work unless RINEER did it himself. (Deft. Exhibit "I", Rep. Tr., p. 122).

GOODMAN did in fact complete RINEER'S work under the contract, finishing the work before November 19, 1965. GOODMAN used the same type of sand and used the same type of equipment in completing RINEER'S work under the subcontract as RINEER was using when he quit work. The Government accepted the work of GOODMAN, stating the work met specifications although the job took somewhat longer than the Government had anticipated. (Rep. Tr., pp. 55, 63).

The only specification for the sand to be used on the contract is found in Plaintiff's Exhibit 2. The pertinent part thereof as it relates to moisture reads as follows:

> "The aggregate shall be sufficiently free of moisture to enable it to be readily coated with bituminous material. Drying of the aggregate may be required, as directed." (Plf. Exhibit No. 2, Rep. Tr., p. 237).

It is to be noted that nothing in these sand specifications refer to either "concrete" or "plaster" sand. RINEER did not attempt to dry the sand aggregate in order to make it more usable.

TURLOCK'S representative testified that he quoted $1.30 per ton to GOODMAN assuming concrete sand was what was desired for the job since TURLOCK uses concrete sand for seal coat on other similar jobs. (Rep. Tr., p. 294).

The price of "plaster" sand (which is a "finer" sand than concrete sand) is $1.50 per ton. (Rep. Tr., p. 294).

This $1.50 price was first quoted to GOODMAN'S representative after RINEER had changed the order from concrete sand to plaster sand. (Rep. Tr., p. 295.)

QUESTIONS ON APPEAL

I PLAINTIFF RINEER'S COMPLAINT DOES NOT STATE A VALID AND LEGAL CAUSE OF ACTION UNDER THE MILLER ACT AGAINST APPELLANTS.

II UNDER THE WRITTEN SUBCONTRACT BETWEEN RINEER AND

GOODMAN, RINEER WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF THE SAND ON THE PROJECT. THE COURT ERRED IN NOT MAKING A FINDING OF FACT ON THIS ISSUE.

III EVEN IF GOODMAN WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF SAND ON THE PROJECT, RINEER ASSUMED THIS RESPONSIBILITY BY CHANGING THE TYPE OF SAND ORDERED.

IV SINCE THE GOVERNMENT ACCEPTED THE JOB AS COMPLETED BY GOODMAN (WITH THE SAME TYPE OF SAND AND EQUIPMENT WHICH RINEER COULD NOT USE SUCCESSFULLY) IT MUST BE CONCLUDED THAT RINEER WAS INCOMPETENT AND INEXPERIENCED IN HIS DUTIES.

V THE TRIAL COURT ERRED IN FINDING THAT GOODMAN GUARANTEED THAT THE SAND WOULD BE ACCORDING TO SPECIFICATIONS.

VI TURLOCK SHOULD BE RESPONSIBLE FOR THE EXTRA EXPENSE GOODMAN INCURRED TO SATISFACTORILY COMPLETE THE PROJECT.

ARGUMENT

I PLAINTIFF RINEER'S COMPLAINT DOES NOT STATE A VALID AND LEGAL CAUSE OF ACTION UNDER THE MILLER ACT AGAINST APPELLANTS.

1. Whether the Complaint of RINEER states a valid cause of action against appellants is in issue and a matter properly before both the trial court and this appellate court.

Issue of fact No. 14 of the stipulated pre-trial order.

2. The issue of whether a suit under the Miller Act for Labor and Materials

is identical to a suit for breach of contract is also properly before the trial court and the appellate court.

Issue of fact No. 3 of the stipulated pre-trial order.

3. RINEER apparently is pleading a "common-count" in his Complaint, since he alleges in paragraph X thereof that certain labor and materials were furnished. It is true that reference to the subcontract between RINEER and GOODMAN is made in the Complaint but nowhere in the Complaint is any allegation as to a breach of the contract by GOODMAN. Nor, is there any allegation of compliance by RINEER of the conditions and covenants on his part required to be performed under the contract.

Paragraph X of RINEER'S Complaint.

4. The applicable law on this question is that suit cannot be brought under the Miller Act on a common count where there is a written contract between the parties unless there is alleged and proven a material breach of that contract.

Jefferson Construction Co. -vs- U. S. ex rel Bacon: 1st circuit (1960) 283 F. 2d 265. Cert. denied (1961) 365 U.S. 835.

Southern Painting -vs- U. S. ex rel Silver: 10th circuit (1955) 222 F. 2d 431.

5. Since RINEER has not alleged and proven a material breach of the contract between RINEER and GOODMAN, his Complaint does not state a valid and legal cause of action against GOODMAN. Also, since RINEER has not alleged and proven his compliance with the covenants and conditions of the contract, the complaint does not state a valid cause of action for this additional reason. In any event,

the Miller Act does not substitute a cause of action on a common count in derrogation of the provisions of an expressed subcontract.

Jefferson Construction Co. -vs- U. S. ex rel Bacon id.

Southern Painting -vs- U. S. ex rel Silver id.

1 Witkin Summary 294:

Calif. Civil Code 1439:

De la Falaise -vs- Gaumont Pictures (1940) 103 P. 2d 447,

39 Cal. App. 2d 461:

Lewis Publishing Co. -vs- Henderson (1930) 284 P. 713,

103 Cal. App. 425.

II UNDER THE WRITTEN SUBCONTRACT BETWEEN RINEER AND GOODMAN, RINEER WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF THE SAND ON THE PROJECT: THE COURT ERRED IN NOT MAKING A FINDING OF FACT ON THIS ISSUE.

1. There is no doubt that the water in the sand obtained from TURLOCK caused the difficulty encountered on the job by RINEER. Who is responsible for the selection and furnishing of the sand on the project is one of the basic issues in this case.

Issue of fact No. 6, Stipulated pre-trial order.

Rep. Tr., p. 159, ll. 9 - 11.

Rep. Tr., p. 176, ll. 1 - 3.

2. Since this issue is so important, and because it is one of the ultimate issues of fact to be decided as specified in the stipulated pretrial order, it should have been decided by the trial court. Nowhere in the Findings of Fact is there

any statement by the trial court to answer this issue. Appellants respectfully suggest that this omission by the trial court is error which must itself lead to a reversal in this case. As stated in JAMES -vs- HALEY, 212 Cal. 142, 297 P. 920, and MASON -vs- ENNES, 172 Cal. App. 2d 99; 342 P. 2d 79, the rule of law is that findings are required on all material issues raised by the pleadings and evidence, unless waived, and if the court renders judgment without making findings on all material issues, the case must be reversed.

3. In considering this issue on the factual merits, the subcontract between RINEER and GOODMAN (Plf. Exhibit 4 and 5) should be first examined, and from that document these points observed.

(a) "Sub-contractor (Rineer) certifies and agrees that he is fully familiar with all of the terms, conditions and obligations of the Contract Documents, as hereinafter defined, the locations of the job site, and the conditions under which the work is to be performed, and that he enters into this sub-contract based upon his own investigation of all of such matters and is in no way relying upon any opinions or representations of the Contractor". (Goodman) (Sub-contract Page 1 of Plf. Exhibit 4 & 5.)

(b) "Sub-contractor (Rineer) agrees to furnish all labor, materials, installation, cartage, supplies, equipment, scaffolding, tools, and other facilities of every kind and description required for the prompt and efficient execution of the work described herein, and to perform the work necessary to complete

sealing and sanding for the said project in strict accordance with the Contract Documents as described herein, and as more particularly, though not exclusively, specified in Section 6 of the specifications for the above-mentioned Contract Number AF 04 (604) - 2546." (Plf. Exhibit 1 - the Government Contract.)

Sec. I - "Scope" of Sub-contract

Plf. Exhibit 4 & 5

Plf. Exhibit 2

(c) "In the event the scope of the work includes installation of materials or equipment furnished by others, it shall be the responsibility of the sub-contractor (Rineer) to examine the items so provided and thereupon handle, store and install the items with such skill and care as to insure a satisfactory installation. Loss or damage done due to acts of the sub-contractor shall be charged to the account of the sub-contractor and deducted from the monies due under this agreement."

Sec. U - Materials furnished by others

"General Conditions" of Sub-contract

Plf. Exhibit 4 & 5.

(d) "The sub-contractor (Rineer) guarantees all materials and workmanship and agrees to replace at his sole cost and expense and to the satisfaction of the sub-contractor (Goodman), any or

all materials adjudged defective or improperly installed as well as guarantee the owner (Government) and contractor (Goodman) against liability, loss or damage arising from said installation during a period of one year from completion and acceptance of the entire project."

Sec. S - Guarantee:

"General Conditions" of Sub-contract

Plf. Exhibit 4 & 5.

(e) Under the Special Provisions clause of the sub-contract, the following language is found:

"Sand to be supplied by Turlock Rock Company, at the plant, at $1.30 per ton, plus sales tax, according to the specifications. Any reduction in the sand price, will reduce Rineer's Oil contract by an equal amount."

4. The testimony in this case reflects that RINEER had been quoted a price of $1.50 per ton for the sand, whereas, GOODMAN had been quoted a price of $1.30 per ton. (Rep. Tr., pp. 78, 147, 152, 178, 182). The confusion undoubtedly stemmed from the fact that TURLOCK quoted its price of $1.50 per ton for plaster sand to RINEER and $1.30 per ton for concrete sand to GOODMAN.

This confusion led to the stipulation in the sub-contract - special provision (e) (supra) which provided for the $1.30 per ton price. This substantiates GOODMAN'S testimony that RINEER had insisted upon this provision in the contract, rather than GOODMAN. (Rep. Tr., p. 198, l. 21).

This also substantiates GOODMAN'S testimony as to the paragraph in the special provision dealing with any possible reduction in the sand price of $1.30 since the $1.30 price was considered to be a top price for the sand desired and selected by the government. (Rep. Tr., pp. 258, 259).

Also, the testimony is to the effect, fairly construed, that the only reason that TURLOCK ROCK was expressly stated as the source of the aggregate for the job was because it was the approved source of the government and because RINEER wanted a guarantee as to the maximum price. Otherwise, TURLOCK would be considered in the same category as the DOUGLAS OIL COMPANY (another Government approved source but where there was no problem as to price for the oil).

5. In summary, it must be concluded that RINEER was responsible for the selection and furnishing of the sand on the project because of the express wording of the subcontract; in that RINEER agreed to furnish all labor and materials for the work, and that it was RINEER'S responsibility to examine the items so provided, and RINEER guaranteed all materials and workmanship. The testimony as to the confusion over different price quotations by TURLOCK also substantiates RINEER'S responsibility since the price finally claimed by TURLOCK was the price quoted to RINEER.

III EVEN IF GOODMAN WAS RESPONSIBLE FOR THE SELECTION AND FURNISHING OF SAND ON THE PROJECT, RINEER ASSUMED THIS RESPONSIBILITY BY CHANGING THE TYPE OF SAND ORDERED.

1. Despite the apparent confusion caused by the $1.50 per ton quotation for one type of sand to GOODMAN, and $1.30 per ton quotation to RINEER, the crucial point involved in the testimony, however, is that Lt. Swan (the representative for the Government) had selected and approved concrete sand (the $1.30 type sand). (Rep. Tr., pp. 124, 133, 137, 243 and 294).

2. RINEER arbitrarily rejected the approved type of sand, and taking it upon himself, decided to substitute therefor the plaster sand ($1.50) which he thought would be better for the job he was to do. This despite the fact that Lt. Swan had previously approved the concrete sand; and despite the fact that TURLOCK had plenty of concrete sand on hand, that this sand was dry, and would have caused no trouble on the job for RINEER. (Rep. Tr., pp. 124, 133, 137 and 294.)

3. Also, RINEER made this decision to change the type of sand knowing that TURLOCK would have trouble making the plaster sand. (Rep. Tr., p. 133, ll. 24 and 25).

4. It must be noted quite strongly that RINEER made this decision changing the type of sand at least one month before he signed the contract with GOODMAN. (Rep. Tr., p. 83, ll. 3-15).

5. Therefore, it must be concluded that even if GOODMAN could be said to be responsible for the selection and furnishing of the sand, RINEER assumed this obligation by changing the type of sand ordered. He did this in the face of refusing the type of sand the Government itself had selected. So, RINEER must be held

responsible for the difficulty which he encountered with the sand received from TURLOCK.

IV SINCE THE GOVERNMENT ACCEPTED THE JOB AS COMPLETED BY GOODMAN, (WITH THE SAME TYPE OF SAND AND EQUIPMENT WHICH RINEER COULD NOT USE SUCCESSFULLY) IT MUST BE CONCLUDED THAT RINEER WAS INCOMPETENT AND INEXPERIENCED IN HIS DUTIES.

1. Defendant's exhibit "A" is a letter dated July 30, 1965, from Mr. William R. Mann, the Air Force contracting officer on the project. In this letter, he states,

> "I have doubts concerning the competency of your sub-contractor RINEER. However, he was selected by your firm and his ability or inability to perform does not appear to be grounds in itself to alter the approved progress schedule.

2. Also at page 24 of the Reporter's Transcript at line 9-11, Mr. Mann testified:

> "Q: You knew that there was trouble in the performance of Mr. Rineer's job; did you not?"
>
> "A: Yes."

3. The Government issued a stop order on the project because of the work of RINEER. (Deft. Exhibit "B", Rep. Tr., pp. 26, 27).

4. RINEER was put on notice as to the possible necessity of drying the sand by the specifications. (Plf. Exhibit 2 - Specifications). And yet, he did nothing in the attempt to dry the sand and complete the job. He failed completely in his duties under the sub-contract.

5. When RINEER arbitrarily refused to return to work after due and proper notice by GOODMAN, the job was completed on GOODMAN'S forces using the same type of sand RINEER had ordered, and with the same type of equipment as RINEER had used. The job just took a little longer and took more imagination in the execution on the job. The Government accepted the job as completed by GOODMAN so that it had to be completed according to specifications. (Rep. Tr., pp. 55, 69 and 70).

6. It is only logical therefore to conclude that the trouble in this project was due entirely to the inexperience and inability of RINEER, not of any actions of GOODMAN. In other words, RINEER failed to comply with the conditions and covenants of his sub-contract required to be performed on his part.

7. It is of course, the law that RINEER had to be free from substantial default himself in order to avail himself of the remedies for GOODMAN'S alleged breach of the contract. Hence, RINEER had to plead and perform performances or tender of performance on his part or an excuse for performance. Or, stating the rule another way, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself. RINEER did not allege or prove this obligation.

1 Witkin Summary 294:

Calif. Civil Code 1439:

De la Falaise -vs- Gaumont Pictures (1940) 103

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Lewis Publishing Co. -vs- Henderson (1930)

284 P. 713, 103 Cal. App. 425.

V THE TRIAL COURT ERRED IN FINDING THAT GOODMAN GUARANTEED THAT THE SAND WOULD BE ACCORDING TO SPECIFICATIONS

1. Paragraph XII of the Findings of Fact by the trial court states that GOODMAN guaranteed that the sand obtained from TURLOCK would be according to specifications The court also found as a fact that the sand did not meet specifications as to moisture content. (Paragraph XII - Findings of Fact, lines 13 and 14, page 103 of Transcript of Record).

2. Appellants respectfully suggest that this finding by the trial court is not supported by the evidence. In fact, the evidence clearly reflects the contrary.

(a) Under the terms of the sub-contract, RINEER was responsible for the selection and furnishing of the sand. (See argument supra).

(b) RINEER also expressly guaranteed all materials and workmanship under the sub-contract

Sec. "S" of "General Conditions"

Plf. Exhibit 4 and 5

(c) The Special Provisions of the contract do refer to the specifications of the sand, it is true. The pertinent part is again stated:

"Sand to be supplied by TURLOCK Rock Company, at the plant at $1.30 per ton, plus sales tax, according to the specifications"

But this does not necessarily mean that GOODMAN was guaranteeing that the sand was to be according to specifications. To hold this would be to completely derogate Sec. "S" of the

general conditions in which RINEER guaranteed the sand.

3. It must be remembered also that RINEER changed the type of sand the government had originally selected. How can GOODMAN therefore be held to guarantee the sand used when RINEER arbitrarily and voluntarily chose to take this action?

4. Even if the court was correct in holding that GOODMAN guaranteed that the sand would be according to specifications, there is no evidence that the sand was not according to specifications.

(a) The only specification for the sand appears in plaintiff's exhibit No. 2 as follows:

"The aggregate shall be sufficiently free of moisture to enable it to be readily coated with bituminous material. Drying of the aggregate may be required, as directed."

(b) There is of course, no "percentage of moisture" content or other standard to apply here, and we have to look to what the government did to see if the sand met the specifications or not. Mr. Bruce of the government testified as follows on this subject:

"Q: But the job was finally accepted, though; was it not?"

"A: Yes, Sir, it was finally accepted, that it met the specifications although it took somewhat longer than we had anticipated."

"Q: Speaking of specifications, the specifications as far as the sand was concerned, were completely complied with, with the

exception of the spreading difficulty; is that correct?"

"A: Yes, Sir."

Rep. Tr., p. 55, lines 2 - 11 inclusive.

VI TURLOCK SHOULD BE RESPONSIBLE FOR THE EXTRA EXPENSE GOODMAN INCURRED TO SATISFACTORILY COMPLETE THE PROJECT.

1. TURLOCK originally initiated the problems here by quoting a price of $1.50 per ton to RINEER and $1.30 per ton to GOODMAN. When Lt. Swan selected the $1.30 per ton type of sand, and then RINEER rejected this type and selected the $1.50 per ton type, it would appear that TURLOCK was under a duty to at least inform GOODMAN of this change. This becomes obvious when we hear that TURLOCK looked only to GOODMAN for the payment of the obligation.

2. Since TURLOCK had plenty of the $1.30 dry sand on hand to complete the job, and TURLOCK went along with the change to the $1.50 wet sand by RINEER, it then follows that the additional cost incurred by GOODMAN in using the wet sand after RINEER left the job should be assessed against TURLOCK. The trial court erred in not granting judgment for appellants against TURLOCK.

CONCLUSION

Based upon the above, it is respectfully submitted that the trial court erred in giving judgment for the Appellees-Plaintiffs in this action. The facts elicited by the testimony and the documentary evidence should have logically led the trier of fact and should lead this honorable court to reverse the judgments and to render judgment for the Appellants-Defendants.

Respectfully submitted,

MARSH AND GRAVES

By /s/ EDWARD E. MARSH, JR.

Attorneys for Defendants-Appellants

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARSH AND GRAVES

By /s/ EDWARD E. MARSH, JR.

No. 21983

In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN,
Appellant,

vs.

THE STATE OF CALIFORNIA, et al.,
Appellees.

APPELLANT'S OPENING BRIEF

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN, *Appellant,* vs. THE STATE OF CALIFORNIA, et al., *Appellees.*	No. 21983

APPELLANT'S OPENING BRIEF

STATEMENT OF FACTS OF THE CASE

A notice of motion to file a cross-complaint was noticed for hearing before Judge William Levit; on arrival for the hearing, Judge Levit stated that the matter was being referred to Commissioner Harold V. Boisvert. Appellant immediately stated that Commissioner Boisvert was not acceptable (a motion for disqualification under Section 170.6, California Code of Civil Procedure, against Commissioner Boisvert); whereupon Judge Levit stated he felt that a prior stipulation for Commissioner Boisvert to hear as a Judge Pro Tempore the Pre-Trial Conference would carry over for this motion.

This is error in that upon the statement of disqualification under Section 170.6, the Judge must hear the matter of disqualification at once.

Upon arrival before Commissioner Boisvert, appellant found that there was a reporter present to report the proceedings, in violation of Rule 211(b), California Rules of Superior Court. Immediately, before appellant or his counsel could utter a word, Commissioner Boisvert demanded to know if appellant was wearing a recorder; when told yes, Commissioner Boisvert held appellant in contempt of court, and ordered the bailiffs to arrest him and search him at once.

This was error, in that:

1. Commissioner Boisvert had not been stipulated to by appellant for the hearing of a contempt, but only for the Pre-Trial, a separate and distinct matter.

2. Commissioner Boisvert required of appellant that he make a self-incriminating statement in order to prove the charge of contempt, thus violating due process.

3. Commissioner Boisvert did not have authority to order the arrest of appellant; it was later held that there was no contempt involved by the California Ditsrict Court of Appeal.

Thereafter, Commissioner Boisvert turned to appellant's counsel and asked question and found appellant's counsel in contempt, and ordered his arrest and search; this is not a matter herein involved.

Thereafter, in due course, this action for damages for violation of the Civil Rights of appellant was brought, and a motion to dismiss was granted by Judge Ferguson on the grounds that Commissioner Boisvert was acting as a Judge Pro Tempore throughout the proceedings and the doctrine of judicial immunity applied.

JURISDICTION

This action arose out of a violation of Civil Rights as defined in 42 U.S.C. Section 1983, and 1985, as set forth in the complaint and the Trial Court had jurisdiction to hear and determine the matter.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983.

QUESTIONS RAISED

1. Did Judge Ferguson commit error in holding that Commissioner Boisvert had jurisdiction as to all matters before him, including the charge of contempt?

2. In the absence of any jurisdiction to hear the charge of contempt, did Judge Ferguson commit error in holding that judicial immunity protected Commissioner Boisvert from a Civil Rights action?

I

In the judgment herein, Judge Ferguson notes on page 2, at line 31, that Judge Levit transferred the hearing of the motion to file a cross-complaint to Commissioner Boisvert, over the objections of Mr. Hagan, appellant herein. (Lines 1 to 3, of page 3, read as follows:

> "Judge Levit found that the motion appeared to be a renewal of the same motion previously heard and ruled upon by Commissioner Boisvert, and thereupon overruled the objection. * * * "

Judge Levit heard counsel for Mr. Hagan voice an objection to Commissioner Boisvert, under Section 170.6, California Code of Civil Procedure, and stated that this objection could be raised before Commissioner Boisvert and further stated that he thought the stipulation was still in effect.

California Law is otherwise. The law is well settled in California and recently stated in *Swartzman v. Superior Court,* 231 Cal. App. 2d 195, at page 200, where it is said:

> "A challenge under Section 170.6, CCP, is not timely when made after a Judge has heard and ruled on contested issues of law or fact in an action or proceeding. (*McClenny v. Superior Court,* 60 Cal. 2d 677; *Jacobs v. Superior Court,* 53 Cal. 2d 187."

Every California case on the question of whether or not a motion was made under said Section 170.6, is timely has in it the qualifications, that a motion is not made timely when it is made after a Judge determines an issue of law or fact.

In the instant case, Commissioner Boisvert had heard neither. He could not, and had he done so, he would have been without jurisdiction because he was assigned to hear Pre-Trial matters, which do not determine any of the merits of the case, but, merely by agreement, crystalize the issues, learn admitted facts, and separate the contentions remaining for trial.

Therefore, as a matter of practicality, common usage and habit, Commissioner Boisvert could not have heard any issue of law or fact, and the motion to disqualify him, made under Section 170.6, was therefore timely.

Judge Levit, therefore, acted completely without jurisdiction in denying appellants his right to urge the disqualification of Commissioner Boisvert.

This is a fact which has been made clear repeatedly through all briefs in this action and is in and of itself a denial of due process and unequal protection of the law.

II

COMMISSIONER BOISVERT ACTED THROUGHOUT IN EXCESS OF JURISDICTION IN FINDING APPELLANT IN CONTEMPT OF COURT.

Aside from any other fact, and assuming only for the point of this argument that Commissioner Boisvert was properly sitting as a Judge Pro Tempore, without conceding this to be true, Commissioner Boisvert acted completely without jurisdiction and in excess of his jurisdiction in finding appellant in contempt of Court.

The Reporter's Transcript, which was a part of the record in the Court below, shows clearly that Commissioner Boisvert did not give appellant any opportunity to defend himself, or to make any statement save and excepting a requirement from the Commissioner that appellant make a self-incriminating statement as to whether or not he had on his person or was using recording equipment.

No Judge has a right to deny a litigant or an accused the right to a defense; this right of defense is so basic and vested that it is not subject to doubt. However, the Reporter's Transcript clearly shows that Commissioner Boisvert acted completely without jurisdiction in that he denied appellant the right to defend himself as to a possible charge of contempt of Court.

This, in and of itself, without regard to any other argument, is sufficient to prove that Commissioner Boisvert was acting without jurisdiction.

As a matter of fact, the situation described herein is exactly that set forth in *Exparte Virginia,* 100 U.S. 339, 25 Law Ed. 676, where the Court stated that the presence of malice and the intention to deprive a person of his Civil Rights is wholly incompatible with the judicial function. WHEN A JUDGE ACTS INTENTIONALLY AND KNOWINGLY TO DEPRIVE A PERSON OF HIS CONSTITUTIONAL RIGHTS, HE EXERCISES NO DISCRETION OR INDIVIDUAL JUDGMENT; HE ACTS NO LONGER AS A JUDGE, BUT AS A MINISTER OF HIS OWN PREJUDICE.

As Justice Douglas said in dissenting opinion in *Pierson v. Ray,* 87 Supr. Ct., 1213:

> "This is not to say that a Judge who makes an honest mistake should be subjected to Civil Liability. It is necessary to exempt Judges from liability for the consequence of their honest mistakes. * * *.
>
> "That is far different from saying that a Judge shall be immune from the consequences of any of his judicial actions and that he shall not be liable for the knowing and intentional deprivation of a person's Civil Rights. What about the Judge who conspires with local law enforcement officers to 'railroad' a dissenter? What about the Judge who knowingly turns a trial into a 'kangaroo' Court? * * * ? Congress, I think concluded that the evils of allowing intentional, knowing deprivation of

> Civil Rights to go unredressed far outweighed the speculative inhibiting effects which might attempt an inquiry into a judicial deprivation of Civil Rights."

Throughout the entire proceedings, appellant has sought a ruling as to whether or not Commissioner Boisvert had jurisdiction as to the proceedings to be held on the day in question, one for contempt and one for a motion.

It is well settled under California Law, in *In Re Gould,* 195 Cal. App. 2d 172, and particularly in *In Re Wales,* (1957), 153 Cal. App. 2d 117, that a contempt proceeding is separate and distinct from the action in which it arises. The *Wales* case, is particularly appropriate and is cited at length below because it is squarely in point here:

> "Unquestionably the authority of a Judge Pro Tempore, regularly selected and appointed pursuant to Article VI, Section 5, of the California Constitution, as to the cause in which he is appointed continues until a final disposition. (Citing cases). However, a contempt proceeding is not a Civil Action, either in law, or in equity, but is a separate proceeding of a criminal nature. (Citing Cases) Notwithstanding the recognized practice to prosecute the contempt in the cause of proceeding out of which it arose, and not as a separate proceeding with a title of its own. (Citing cases)."

"Commissioner Clad, not having been selected and appointed as a Judge Pro Tempore to hear the particular contempt proceedings, (based upon the order to show cause dated May, 1957), was without authority to make the order of commitment, notwithstanding his previous selection and appointment as a Judge Pro Tempore, to hear other contempt proceedings."

The circumstances in *Wales,* are on all fours with our case here. Without conceding the validity of the appointment of Commissioner Boisvert to hear a motion to permit the filing of a cross-complaint, Commissioner Boisvert was not appointed to hear a matter of contempt. The appointment of Commissioner Boisvert as a Judge Pro Tempore to hear the Pre-Trial matter in Superior Court Action No. 704,162, is and was limited. Inasmuch as a contempt proceeding is a separate proceeding, criminal in nature and not a part of the Civil Atcion at bar, *although arising out of it,* Commissioner Boisvert had absolutely no discretion, jurisdiction or authority to hear the contempt matter. His actions therefore, were done in complete absence of jurisdiction.

Other cases which make this same holding are:

In Re DuBois, 120 Cal. App. 2d 890; *Baily v. Superior Court,* 142 Cal. App. 2d, 47, and *In Re Chapman,* 141 Cal. App. 2d 387.

As a corrolary to the foregoing, appellant also cites *Pousson, v. Superior Court,* 165 Cal. App. 2d, 750,

where the Court pointed out that "a Court of Law has no inherent power to arrest citizens or place them in jail." As has been pointed out heretofore, the regularity and propriety of Commissioner Boisvert's order that appellant be taken into custody immediately, particularly in view of the finding of the Court of Appeals, that there was no contempt, is raised and again urged as further example of his complete lack of jurisdiction in the proceedings complained of.

There is an interesting case, having quite a bit of relevence here, *Yates v. Village of Hoffman Estates,* 200 Fed. Supp. 757. This was a Civil Rights Action, wherein the complaint alleged that a Municipal Magistrate directed a Police Sergeant to arrest the appellant. It was held in that case that it is "not a judicial function for a Judge to permit intentional tort, even though tort occurs in Courthouse."

Commissioner Boisvert is not only an attorney charged with special knowledge of the law, but, a Commissioner often acting as a Judge Pro Tempore, charged with interpreting the law. He must have been possessed of knowledge that his acts were completely out of his jurisdiction. His order to the Bailiff therefore, to take appellant into custody was an act of inientional tort within the definitions of the *Yates case.*

Such an order is clearly the type of situation which is outlined in *ExParte Virginia,* 100 U.S. 339, where the Court held that the presence of malice and the in-

tion of a Court to deprive a person of his Civil Rights is wholly incapatible with the judicial function. The Court pointed out that when a Judge acts so intentionally and knowingly as to deprive a person of his Constitutional rights, he is not exercising discretion or individual judgment, which is the line of demarkation between a judicial act and a ministerial act; such person acts no longer as a judge, but as a 'minister' of his own prejudice.

The judgment of Judge Ferguson, beginning at line 1, page 4, states that appellant agrees that Judges enjoy judicial immunity for actions arising out of their judicial acts, within their jurisdiction and that the Civil Rights Act Creates no exception to this immunity. Judge Ferguson cites, *Sires v. Cole,* 320 Fed. 2d 877 on this point, and he went on to say at line 9, that appellant agrees that an allegation of conspiracy will not abolish the doctrine of judicial immunity, citing *Agnew v. Moody,* 330 Fed. 2d 868.

In the case of *Pierson v. Ray,* 87 Sp. Ct., 1213, which was decided in April of this year, and after *Sires,* the immunity of the Judge from a suit for violaton of Civil Rights was upheld not on the basis of an outright and overriding immunity, but because there was no proof that Judge Spencer had played any role whatever in the matter other than to adjudicate the matter from the bench. The opinion went on to say at page 1217:

"Few doctrines were more solidly established at common law than the immunity of Judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher,* 13 Wall (80 U.S. 335, 20 Law. Ed. 646 (1871)."

At page 1218, the Court goes on to say:

"We do not believe that the principal of law was abolished by Section 1983, which makes liable 'any person' who under color of law deprives another person of his Civil Rights. The Legislative Record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."

This is, in truth an amazing opinion. In the first place, the statement that the Judges had immunity from liabilty for damages for acts committed within their judicial jurisdiction rests on *Bradley v. Fisher, supra.* That case had nothing to do with a Civil Rights Action.

Further, as Justice Douglas points out in his magnificently reasoned and supported dissenting opinion, the Congressional Record does show that the Congress very definitely considered the fact that the passage of these Acts would put a Judge under threat of civil suit at all times. There are, in the minority opinion a number of quotations from speeches of members of Congress, made during the debate on the passage of this Act. Nevertheless, the Act was passed — As Justice Douglas notes on page 1222:

> "Yet despite the repeated fears of its opponents, and the explicit recognition that the Section would subject Judges to suit, the Section remained as it was proposed; it applied to 'any person'. THERE WAS NO EXCEPTION FOR MEMBERS OF THE JUDICIARY. * * * "

Again on the same page Justice Douglas notes that *Pierson v. Ray, supra,* is out of line with prior decisions, citing *Ex Parte Virginia,* 100 U.S. 339, 25 Law. Ed. 676. In that particular case, the holding of the Court was very clear and explicit; that the then Civil Rights Act applied to all three branches of the Government. No exception was made in that case as to Judges or to any other person.

Thus, because of the insistence of the Supreme Court on maintaining a common law immunity against the expressed wishes of the Legislature, we are faced with two very serious and far reaching conclusions: First, That a Judge is immune from any act because while the common law immunity from liability granted to Judges for any act arising out of an act committed within their jurisdiction is well established, the immunity has now been extended, against and outside the meaning of the statute and the intent of the Congress to violations of any Civil Rights.

Secondly, we have by this decision, if maintained, created a new race of supermen. We now have a group of men in this United States who are immune from any liability created by any tort committed by them.

Under *Pierson v. Ray, supra,* State Judges do not suffer the normal result of a tortious act. They are thus, despite the Constitutional provision to the contrary, not equal with other men—they are far superior to other men because they do not have to worry about Civil liability.

This is ridiculous, but, it is a natural extension of the reasoning afforded in *Pierson v. Ray, supra.*

But there is a large question raised in *Pierson v. Ray, supra,* and this question appears and has never been decided in other important decisions on Civil Rights. The question is simply this:

> "What is an act done within the 'judicial jurisdiction?"

Judge Ferguson stated (page 6, lines 16-18) with reference to Commissioner Boisvert, that all proceedings therefore before him, were judicial proceedings and the doctrine of immunity applies. There is no citation for this holding and with this holding, Judge Ferguson does, in effect, hold that a Judge Pro Tempore or not, has jurisdiction to deprive a person of Civil Rights or a Constitutional Right.

The question of whether a Judge has committed an act within his judicial jurisdiction so as to enable him to be sheltered behind a Court granted immunity, as against a statutory liability created by the Congress, must be clearly and finally defined.

In *Agnew v. Moody, supra,* 330 Fed. 2d, 868, decided by this Court in 1964, it was held that a allegation of conspiracy would not abolish the doctrine of judicial immunity.

Judge Ferguson relied upon the case of *Agnew v. Moody, supra,* for the proposition that even an allegation of conspiracy will not defeat judicial immunity. This case, in and of itself is very interesting and a strange one. It was decided in 1964. However, Section 1985, in one form or another had been on the books of the United States since 1961 and provides that 'any person' who conspires to deprive a person of a Constitutional Right is civilly liable.

There is absolutely nothing to be found in the statute which exempts Judges from the conspiracy provision of the Civil Rights Act. In fact, *Ex Parte Virginia, supra,* cited above, stands for the opposite proposition and found a Judge guilty of violating a Civil Rights, even though it was done in the course of a judicial proceeding, i.e. the selection of a jury.

There is to be found an inference in *Pierson v. Ray, supra,* that if the Judge Spencer involved had played any role in the arrest and conviction, prior to the time the defendants are brought before him, for adjudication, that he might not have had judicial immunity. This is not expressed, but, there is a very clear inference in the opinion to this effect.

In order that litigants might go before a Court in full freedom, knowing that while a Judge is a man and can only rule in the light of his own experience and knowledge, and that they have recourse to the Appellate Courts should they desire, that they would have a remedy in the event of any of their Constitutional Rights foreclosed to them, it must be decided what constitutes a 'judicial jurisdiction,' so as to afford a judge complete immunity.

In the instant case, the facts of conspiracy are alleged in the complaint and give credence to the charge of conspiracy.

The definition of "excess of jurisdiction" has been definitely made in California in *Abelleiro v. District Court of Appeal,* 17 Cal. 2d 280, (109 Pac. 2d, 942, 132 A.L.R. 715., Excess of jurisdiction, briefly, consists, among other things of improperly applying the law. In that opinion, there is nothing whatever to be said about an act, whereby a Judge deprives a litigant or an accused of any Constitutional Rights. The failure to include an illegal act in *Abelleiro,* must therefore be considered to mean that an act done without jurisdiction is not merely in excess of jurisdiction, but is an act done in the complete absence of jurisdiction.

CONCLUSION

There are two defendants—Judge Levit and Commissioner Boisvert. The Judge acted as a principal and the Commissioner as agent. The Tort duty is encompassed in the Civil Rights Act. The Judge's act or failure to act was in refusing to disqualify the Commissioner, whom it was apparent to defendant and known among local judiciary would act with malice for what the Commissioner deemed erroneously to be a past invasion of the Commissioner's right of privacy. The principal agent analysis dispenses with the Ninth Circuit Court's animadiersion to conspiracy in Civil Rights violation where is obviously abounds.

The Judge defendant invokes the outmoded doctrine of immunity of public officers which the Ninth Circuit unwillingly has diluted in several cases among them the *Mickey Cohen cases* and others, where the District Attorney went off base, as here the Commissioner, the principal defendant, steps out of his proper role and becomes the avenger. It is unfair to the nearly one hundred percent of American Judges who do not require the milquetoast assessment of their character which is the basis of the spineless doctrine of judicial immunity. The dissent in *Pierson v. Ray, supra,* exposes this fallacious doctrine. It would not be remiss for the Ninth Circuit to meet this problem now where the facts demand judicial redress.

The Court below relies on a case which is sui generis and merely is a panegyric to Judge Bledsoe, (*Anderson v. Bledsoe,* (1934) 139 Cal. App. 650. The Court there identified Bledsoe as a former United States District Court Judge, who "obliged" the litigants by accepting appointments as a Pro Tempore Judge." This is strictly ad hominem.

In granting the writ of Habeas corpus in this case, the Court stated this shoudn't even happen to Hagan. *Bradley v. Fisher, supra,* holds where there is no jurisdiction, there is no judicial immunity. There was no jurisdiction here. If ever there was jurisdiction ,it had elapsed. The Commissioners animus leaps from the printed page as shown by the transcript and the case of *In re Hagan,* 224 Cao. App. 2d, 590. No greater example of a star chamber proceding can be conjured. Commissioner Boisvert wanted this man arrested. He was so carried away he forget to rule that defendant should be put in irons..

Among the many cases holding that a Commissioner in like circumstances loses his jurisdiction are the following:

In Re Wales, (1957) 153 Cal. App. 2d 117.

Respectfully submitted,

JESSE A. HAMILTON,
Attorney for Appellant.

Appendix

APPENDIX "A"

CASES RELIED UPON

"Courts of law have no inherent power to arrest citizens or place them in jail. The Legislature makes this caes on that subject within Constitutional limits. The jurisdiction of Courts in matters of arrest is controlled by the Constitution in the first instance, and the next by statutory authorization. (*In Re Mulford,* 73 Cal. App. 2d 452)"

Pousson v. Superior Court, (1958) 165 Cal. App. 2d, 750, 754.

" * * * it is equally elementary that disobedience of a void order made in excess of the jurisdiction of the Court does not constitute a contempt. (citing cases)"

After quoting from *In Re Mulford, supra,* the Court states:

"We are unable to find that the order for petitioner's arrest conformed to any authorized statutory procedure."

Silvagni v. Superior Court, (1958) 157 Cal. App. 2d 287.

"In the absence of any showing that an actual contempt of Court was committed, the order of the Superior Court cannot stand."

In Re Hagan, (1964) 224 Cal. App. 2d, 590-594.

UNITED STATES COURT OF APPEAL FOR THE
NINTH CIRCUIT

CASE NO. 21983

C E R T I F I C A T E

I certify that, inconnection with the preparation of the opening brief of Evert L. Hagan, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, said brief is in full compliance with these rules.

DATED: November 28, 1967.

JESSE A. HAMILTON,
Attorney.

No. 21983

In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN,
Appellant,
vs.
THE STATE OF CALIFORNIA, et al.,
Appellees,

Respondents' Reply Brief

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In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN, *Appellant,* vs. THE STATE OF CALIFORNIA, et al., *Appellees,*	No. 21983

Respondents' Reply Brief

Come now the respondents Harold V. Boisvert, Court Commissioner of the Superior Court of the State of California for the County of Los Angeles and William H. Levit, Judge of the Superior Court of the State of California for the County of Los Angeles, and present herewith their Reply Brief on Appeal:

STATEMENT OF FACTS

Although appellant attempts to set forth the facts of this case in a general fashion in his Opening Brief, significant facts are overlooked or underemphasized. Therefore, respondents deem it necessary to set forth the facts herein.

Appellant, as a party to litigation pending in the Superior Court of the State of California for the County of Los Angeles, stipulated in writing that Court Commissioner Harold V. Boisvert could preside as judge pro tempore for the pre-trial of the then pending lawsuit. The Pre-Trial Conference Order, dated October 2, 1963, made by Commissioner Boisvert stated that "no law and motion matters are pending or likely." When appellant made a motion for leave to file a cross-complaint, it was heard and denied on October 21, 1963, by Commissioner Boisvert as the pre-trial conference judge, pursuant to Rule 216 of the California Rules of Court (motions to modify the pre-trial conference order to be heard by the pre-trial conference judge, if available). When appellant herein filed a second motion for leave to file a cross-complaint, it was transferred again to Commissioner Boisvert, as pre-trial conference judge, on November 22, 1963, but over appellant's objection, by respondent Judge Levit. The latter indicated that the motion of appellant seemed to be a renewal of the same motion theretofore heard and decided by Commission Boisvert.

When appellant appeared before Commissioner Boisvert, appellant was found in contempt for recording the proceedings on his recording equipment. Thereafter appellant was absolved of the contempt charge, but the state court made no finding as to the applicability of the stipulation (*In re Hagan,* 224 Cal. App.

2d 590). Appellant's subject action under the federal Civil Rights Act was dismissed below and appellant prosecutes this appeal from the said judgment of dismissal.

ARGUMENT

I

THE CHALLENGE TO COMMISSIONER BOISVERT WAS NOT TIMELY.

Appellant argues in Point I of his Opening Brief that since appellant had challenged Commissioner Boisvert under Section 170.6 California Code of Civil Procedure, that Commissioner Boisvert, therefore, lacked jurisdiction to hear the motion in question. Appellant cites for this proposition the decision of the California Court of Appeal in *Schwartzman v. Superior Court*, 231 Cal. App. 2d 195, 200, which holds that such a challenge is *not* timely made if a judge has already heard and ruled on a contested issue of law or fact in an action or proceeding (Opening Brief, p. 4). And this is precisely the situation in our case!

As pointed out in the Judgment of Dismissal from which this appeal is prosecuted (p. 2 thereof):

> "On October 21, 1963, Commissioner Boisvert *heard and denied* a motion of Hagan for an order granting him leave to file a cross-complaint."

Having thus ruled on a contested issue of *law* (similar to the *Schwartzman* case, supra), Hagan's attempt to disqualify Commissioner Boisvert a month later, on November 22, 1963, was *not timely made.*

Respondent Judge Levit, therefore, acted not only within his jurisdiction, but also without error, in denying appellant's request to disqualify Commissioner Boisvert.

II

THERE WAS NO CLEAR ABSENCE OF ALL JURISDICTION AS TO THE CONTEMPT MATTER.

Appellant evinces his wishful thinking as to the law applicable here by citing the *dissenting* opinion in *Pierson v. Ray,* 87 Cal. S. Ct. 1213, 18 L. ed. 2d 288. (Opening Brief, p. 7) The fact is that the above cited case stands for the oft-stated rule of law that a judicial or quasi-judicial officer is *not* liable in damages under the federal Civil Rights Act unless there is a *clear absence of all Jurisdiction* in the officer. This is plainly *not* the case here.

Judge Levit transferred the motion of appellant to Commissioner Boisvert, as judge pro tempore, on the basis that it was: (1) a matter which would modify the pre-trial order, which Commissioner Boisvert had already made; and (2) it was a repetition of a motion which Commissioner Boisvert had already ruled on. The well-reasoned decision of the court below, as set

forth in its Judgment of Dismissal filed and entered March 17, 1967, sets out the Rule (Rule 216) of the California Rules of Court which *requires* that motions to modify a pre-trial conference order be heard by the pre-trial judge. Certainly it requires no extended argument to conclude that the filing of a cross-complaint, where none existed before, would of necessity modify the pre-trial conference order. Thus, the motion, itself, was properly before Commissioner Boisvert.

Appellant goes on to cite *In re Wales* (1957) 153 Cal. App. 2d 117 for the proposition that, since Commissioner Boisvert was not appointed a judge pro tempore to hear a contempt proceeding, he had no jurisdiction to do so. But the *Wales* case deals with a *separate proceeding* as to *indirect* contempt. In our case we have a situation of *direct* contempt in the proceeding then pending. To say that a judge pro tempore has no power to keep order in his courtroom and to control the proceedings is to divest him of the very authority conferred upon him.

Admittedly, Commissioner Boisvert committed error in holding appellant herein in contempt, as found by the District Court of Appeal in *In re Hagan,* 224 Cal. App. 2d 590. But this is a hindsight judgment of an appellate court and not a determination that Commissioner Boisvert had no *jurisdiction.* As pointed out by Chief Judge Learned Hand in *Gregoire v. Biddle* (2nd Circuit, (1949) 177 F. 2d 579 at p. 581:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the un-flinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books."

The 1880 decision of the U.S. Supreme Court in *Ex parte Virginia,* 100 US 667, upon which appellant appears to rely so heavily (Opening Brief, p. 7), has no applicability here. That case was a mandamus action, not one for damages against a judicial officer.

III

APPELLANT'S ATTACK ON JUDICIAL IMMUNITY IS UNJUSTIFIED.

Appellant attacks the principle of judicial immunity expressed by *Pierson v. Ray,* supra, and other cases, by stating that it has:

> "... created a new race of supermen. We have a group of men in this United States who are immune from any liability created by any tort committed by them." (Opening Brief, p. 13)

This, of course, is nonsense. A judicial officer is only immune to suit for his judicial acts and only then when there is no clear absence of all jurisdiction. *Sires v. Cole* (9th Circuit 1963) 293 F. 2d 756, 761.

As pointed out in *Gregoire v. Biddle,* supra, it would dampen the ardor of all but the most resolute of judges to subject those who do their duty to the constant dread of retaliation. Indeed, there would be no end to litigation if an unsuccessful litigant could always sue the judge who ruled against him.

IV

CONCLUSION

The Points and Authorities annexed to the various motions filed by respondents below, as well as those cited by the United States District Judge in his Judgment of Dismissal, filed and entered March 17, 1967, together with those cited in this Brief, in the opinion of respondents, clearly sustain the Judgment appealed from herein. Based thereon, respondents submit that the Judgment below should be affirmed.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

and

DONALD K. BYRNE,
Assistant County Counsel
Attorneys for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD K. BYRNE
Assistant County Counsel
County of Los Angeles

No. 21983

In the

United States Court of Appeal

For the Ninth Circuit

EVERT L. HAGAN,
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Appellees,

Appellant's Closing Brief

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In the
United States Court of Appeal
For the Ninth Circuit

EVERT L. HAGAN, *Appellant,* vs. THE STATE OF CALIFORNIA et al., *Appellees,*	No. 21983

Appellant's Closing Brief

I

ANSWER TO APPELLEES' POINT I

Appellees refer to the fact that Commissioner Boisvert had ruled on October 21, 1963, (prior to the events complained of herein) on a motion of appellant for an order granting leave to file a cross-complaint. Appellees then state that Commissioner Boisvert ruled on a "contested issue of law" and that Hagan's attempt to disqualify Commissioner Boisvert on November 22, 1963, was "not timely made" under the authority of *Schwartzman v. Superior Court,* 231 Cal. App. 2d 195, 200. Appellees assume that the ruling of October 21, 1963, was a ruling on a "contested issue of law" but they cite no authorities to support their assumption.

California Code of Civil Procedure, Section 589, says:

> "An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof."

Section 590, of the same code provides:

> "An issue of fact arises:
>
> 1. Upon a material allegation in the complaint controverted by the answer; and
>
> 2. Upon new matters in the answer, except an issue of law is joined thereon."

And Section 588 of the same code states that:

> "Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are two kinds:
>
> 1. Of law; and
>
> 2. Of fact."

It would appear from the above sections, that a ruling on whether or not leave should be granted to file a cross-complaint contested is not a ruling on a contested issue of law or fact, but is merely a matter of procedure.

Rules 211 and 212, California Rules of Court, set out in detail the acts that a judge may do at a pre-trial conference, and 216 of the same rules gives the pre-trial

conference judge a continuing jurisdiction as to a motion or attempt to modify the pre-trial conference order.

THERE IS NOTHING WHATEVER TO BE FOUND IN RULE 212 THAT GIVES THE PRE-TRIAL CONFERENCE JUDGE ANY JURISDICTION TO MAKE A RULING UPON A CONTESTED ISSUE OF LAW OR FACT EXCEPT UPON STIPULATION OF THE PARTIES, AND TO DETERMINE THE COURT'S JURISDICTION OF THE CASE.

Under Section 1 of Rule 212, the judge may consider and act upon the written statements of legal and factual contentions; what acts he may do or may not do are not clearly specified. These are not material since the point at issue here is whether Commissioner Boisvert had the right to rule upon the right to file a cross-complaint, which is not a document set forth in Rule 210 of the same rules.

Section 2, of Rule 212, gives the pre-trial judge the right to consider and act upon *amendment* to the pleadings proposed at the time of the pre-trial hearing; this is procedural, and not a ruling upon a contested issue of law or fact.

In fact, under Rule 212, (1), the only ruling of law that the pre-trial judge can make is whether or not the court has jurisdiction in the matter. Beyond that the only act that the pre-trial judge can do is to do a ministerial act.

Other than the somewhat ambiguous provisions of Section 1, of Rule 212, relating to the usual pre-trial conference statements, to repeat, the pre-trial judge cannot act, except by stipulation, other than in a ministerial fashion to aid in the disposition of the matter.

It is further to be noted, that throughout all of the California Rules having to do with or relating to the pre-trial conference in order to emphasize the fact that this is an informal proceeding, having to do only with acts to aid the disposition of the matter at trial, the rules use the word "conference," and not "trial," "hearing" or any similar word commonly used to designate a time at which a ruling on the merits of the matter would be made.

There having been no ruling on a contested issue of law or fact, then, the rule set out in *Schwartzman v. Superior Court,* 231 Cal. App. 2d 195, 200 is controlling and the motion to disqualify Commissioner Boisvert was therefore timely.

II

ANSWER TO APPELLEES' POINT II.

A contempt proceeding is not a civil action either in law or equity, but is a separate proceeding of a criminal nature and summary character in which the Court exercises but a limited jurisdiction.

In Re Chapman, 141 Cal. App. 2d 387, 295, Pac. 2d, 573;

Phillips v. Superior Court, 22 Cal. 2d, 256, 137 Pac. 2d 838;

Hotaling v. Superior Court, 191 Cal. 501, 217 Pac. 73, 29 A.L.R. 127;

Bailey v. Superior Court, 142 Cal. App. 2d 47, 53; 279 Pac. 2d 795;

Warner v. Superior Court, 126 Cal. App. 2d 821-826; 273 Pac. 2d 89.

In *Chapman, supra,* a wife obtained a default divorce and was awarded custody of the children. Thereafter, on application of the husband, the Court modified the divorce decree and awarded custody of the children to the husband and ordered the wife to deliver the children to the husband. This order was made by one Francis A. Cochran, sitting as a judge pro tempore who had, pursuant to stipulation of the parties and order of the Court, been assigned to hear the modification proceedings.

Thereafter, on application of the husband, the wife was adjudicated in contempt of the order of modification because of her refusal to surrender the children to the husband. This order of contempt was made by the same judge pro tempore. There was no stipulation nor order of Court appointing him Judge Pro Tempore to hear this contempt matter.

The Court, after quoting at grant length from *In Re Lake,* 65 Cal. App. 429, at pages 423-425 (224 Pac. 126) said at page 390:

> "It is at once apparent in this case that Commissioner Cochran was not acting as a judge pro tempore by stipulation or appointment and consequently was entirely without jurisdiction to make the order that the wife be committed to jail."

In *Phillips, supra,* the Court said at page 257:

> "A contempt proceeding is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action." (citing cases).

In *Hotaling, supra,* the Court said at page 504:

> "Contempt of Court is a specific criminal offense (citing cases). A contempt proceeding is not a civil action either at law or equity (citing cases), though it may be ancialliary thereto (citing cases), but is a separate proceeding of a criminal nature and summary character (citing cases), in which the

> Court exercises but a limited jurisdiction (citing cases), and in which the people of the state prosecute the action." (citing cases).

There is no inherent power in a Court to place citizens in jail; its jurisdiction in the matter of arrest is limited by the Constitution and statutory enactments.

On page 9 of the opening brief, appellant cites *Pousson v. Superior Court,* 165 Cal. App. 2d 750, for the above proposition. That case is supported by *Silvagni v. Superior Court,* 157 Cal. App. 2d 287, 321 Pac. 2d 15, where the Court said at page 292:

> "Code of Civil Procedure, Section 478, declares that no person can be arrested in a civil action, except as prescribed in this code. * * * There is no inherent power in the Court to place citizens in jail. The Legislature makes the law on that subject within Constitutional limitations. Jurisdiction of Courts in the matter of arrest is limited by the Constitution and statutory enactments."

Contempt proceedings are criminal in nature and should be strictly construed.

> *Butler v. Superior Court,* 178 Cal. App. 2d 763, 3 Cal. Rpt. 180;
>
> *Killpatrick v. Superior Court,* 152 Cal. App. 2d 146, 314 Pac. 2d 164;
>
> *Bennett v. Superior Court,* 99 Cal. App. 2d 585, 593, 222 Pac. 2d 276;

Uhler v. Superior Court, 117 Cal. App. 2d 147; 255 Pac. 26, 29.

It is obvious from the record that Commissioner Boisvert laid a trap for appellant and Commissioner Boisvert was intentionally waiting to spring it. Contempt being a criminal proceeding, appellant was entitled to be informed of his Constitutional rights including his right to remain silent and right to counsel, when asked if he was recording the proceedings. The conduct of Commissioner Boisvert violated the principals of fairness and decency required by Constitutional decisions and therefore violated due process.

For example, see:

Harris v. United States, 382 U.S. 162;

Miranda v. United States, 384 U.S. 436;

Dauglas v. California, 372 U.S. 353;

Escobedo v. Illinois, 378 U.S. 478;

Gideon v. Wainwright, 372 U.S. 335.

In his opening brief appellant cites *In Re Wales,* 153 Cal. App. 2d 117 for the proposition, supported by the foregoing authorities, that Commissioner Boisvert had no jurisdiction to hear the contempt proceeding. Appellees attempt to distinguish *Wales* on the ground that *Wales* was an indirect contempt, whereas this case, appellees say, involves a direct contempt. This is a dis-

tinction without a difference in that the only difference between the two under California law is the mode or procedure of initiating the proceeding.

It is noted that appellees admit (page 5 of appellee's brief) that Commissioner Boisvert erred in holding appellant in contempt.

Appellees say (page 5 of their brief), that the motion to file a cross-complaint would include a motion to modify the pre-trial order. This is not necessarily so. If the motion for leave to file the cross-complaint had been granted, perhaps amendments to the pre-trial order would or would not be in order. Such amendments could be considered in subsequent proceedings for the purpose of considering same.

III

ANSWER TO APPELLEES' POINT III.

Commissioner Boisvert intentionally invoked the contempt. Assuming without conceding, that Commissioner Boisvert ever enjoyed any judicial immunity, he lost it by his deliberate actions.

Appellant believes that *Robichaud v. Ronan,* 351 Fed. 2d 533, is controlling. There this Court said (page 535):

> " . . . We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi judicial capacity, then the reason for this immunity—in integral relationship between

his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of his rights, privileges, or immunities secured by the Federal Constitution and laws. See *Monroe v. Pappe,* 365 U.S. 167. . . To us, it seems neither appropriate nor justifiable, that for the same act, immunities should protect the one, and not the other . . . The trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial role.' If, they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to a police activity, as opposed to judicial activity, then the cloak of immunity should not protect them."

Appellant places much weight on *Pierson v. Ray,* 76 S.Ct., 1213. The decision in that case was that judicial immunity would apply to protect the judge. Appellant very strongly urges to this Court that the reason for the ruling is to be found in the following quotation taken from p. 1217:

"We find no difficulty in agreement with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. THE RECORD IS BARREN OF ANY PROOF OR SPECIFIC ALLEGATION THAT JUDGE SPENCER PLAYED ANY ROLE IN THESE ARRESTS AND CONVICTIONS OTHER THAN TO ADJUDGE PETI-

TIONERS GUILTY WHEN THEIR CASES CAME BEFORE HIS COURT." (Emphasis added).

This is our situation, in reverse. The record here is clear and distinct that Commissioner Boisvert did play more than a judicial role. The facts are clear that Commissioner Boisvert was "ready and waiting" for appellant to appear before him. The record is clear that there was a court reporter ready and waiting to report the words said before the Commissioner.

It appears in the record that Commissioner Boisvert, in addition to finding appellant in contempt, found his counsel in contempt. This contempt proceeding was consolidated for hearing in the California District Court of Appeal. In the return of the County to the petition of said counsel for a writ of Habeas Corpus before said court, it is stated that:

> "The Court, informed of the scheduled hearing, *had ordered an official reporter in order to insure a proper record should a contempt order be appropriate."* (Emphasis added).

This return was signed by Donald K. Byrne, the same attorney, from the County Counsel's Office, who signed appellees' reply brief herein.

The fact in and of itself is enough to prove, without doubt, that Commissioner Boisvert had made up his mind, prior to the time that appellant came before him, that appellant would be doing certain things, and had

made up his mind to take action against appellant at the time of the hearing and to arrange matters so that appellant would be punished and deprived of his civil and constitutional rights, as argued before. Commissioner Boisvert clearly used his powers "to vent his spleen upon others" for a "motive not connected with the public good." Mr. Chief Justice Learned Hand's words in *Gregoire v. Biddle,* 177 F. 2d, 579, clearly recognize the need for some means of punishing a recalcitrant judge who abuses his powers.

IV

CONCLUSION

Appellant respectfully submits:

1. Commissioner Boisvert totally lacked jurisdiction to hear the motion for leave to file the cross-complaint. However, assuming without conceding that he had jurisdiction to hear same, he had absolutely no jurisdiction to rule contempt or hear any matter pertaining thereto.

2. A contempt being a criminal action, even though it arises out of a civil proceeding, a judge pro tempore, duly appointed to hear the civil proceeding only has no jurisidiction to hear a purported contempt arising out of the civil matter.

3. Commissioner Boisvert violated the Constitutional principals of fairness and decency in adjudicat-

ing appellant in contempt without informing him of his Constitutional rights to remain silent and his right to counsel.

4. Commissioner Boisvert stepped out of his purported role of judge pro tempore and acted as a policeman, analogous to the district attorney in the *Robichaud case, supra.*

The judgment appealed from should be reversed and the case remanded for a trial on its merits.

Respectfully submitted:

JESSE A. HAMILTON,
Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JESSE A. HAMILTON,
Attorney for Appellant.

No. 21986

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSIE HAMMAN,
Plaintiff,
vs. Civil No. 476
UNITED STATES OF AMERICA; WASHINGTON IRON WORKS, a Washington corporation; MORRISON-KNUDSON COMPANY, INC., a Delaware corporation; PERINI CORPORATION, a Massachusetts corporation; WALSH CONSTRUCTION COMPANY, INC., an Iowa corporation; and KAISER COMPANY, a Nevada corporation, jointly and severally,
Defendants.

ARLENE HARTUNG REED, Administratrix of the Estate of her deceased husband, ADAM HARTUNG,
Plaintiff,
vs. Civil No. 477
UNITED STATES OF AMERICA, et al,
Defendants.

ANNA LOYNING, Administratrix of the Estate of her deceased husband, SIDNEY A. LOYNING,
Plaintiff,
vs. Civil No. 522
UNITED STATES OF AMERICA, et al,
Defendants.

APPELLANTS' BRIEF AND APPENDIX

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Industrial Safety Is One Of The Broad Social Benefits To Society From A Competitive Economy And A Cause Of Action For Treble Damages Under The Federal Anti-Trust Law Is Stated By Plaintiff Wives Of Construction Workers Killed In A Jurisdiction Protecting Marital Partnership From Invasion In A Bill Of Complaint Which Alleges:

1. Illegal Price Fixing By Giant Competitor Defendants To Fix The Price Of A Forty Million Dollar Government Construction Contract;

2. An Agreement As Part Of The Price Fixing To Use A Cableway Without The Safety Devices Required By The Government Contract;

3. An Agreement As Part Of The Price Fixing To Fraudulently Promise Joint And Several Performance;

4. That Not Only Did The Illegal Price Fixing Allow Defendants To Win The Bid By A Very Small Amount But That The Use Of The Cableway Without The Safety Devices And The Failure Of Several Performance By Two Of The Defendants Were A Direct Cause Of The Death Of Several Construction Workers, Husbands Of Plaintiffs 6

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JURISDICTION

These cases are before the Court on appeal from a final summary judgment (71) dismissing Count III of Plaintiffs' Third Amended Complaint for failure to state a cause of action under The Clayton Anti-Trust Law (38 Stat. 731 (1914)) 15 U.S.C. Sec. 15 (1958).

Each case is a suit for damages with diversity of citizenship and jurisdictional amount pleaded (3, 4, 17, 18, 31, 32).

This Court has jurisdiction to hear these appeals by the authority granted to it by Congress in 72 Stat. 348 (1958), 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

I.

IS THE PREVENTION OF ACCIDENTAL INJURY TO THE LIVES AND MARITAL RELATIONSHIPS OF CONSTRUCTION WORKERS ONE OF THE BROAD SOCIAL BENEFITS TO SOCIETY FROM A COMPETITIVE ECONOMY?

The Lower Court did not examine this question.

Plaintiffs contend the answer should be: "Yes".

II.

IF THE ANSWER TO QUESTION I. IS "YES", IS NOT A CAUSE OF ACTION FOR TREBLE DAMAGES STATED UNDER THE ANTI-TRUST LAWS WHEN PLAINTIFFS' BILLS OF COMPLAINT ALLEGE:

1. ILLEGAL PRICE FIXING BY GIANT COMPETITOR DEFENDANTS TO FIX THE PRICE OF A FORTY MILLION DOLLAR GOVERNMENT CONSTRUCTION CONTRACT;

2. AN AGREEMENT AS PART OF THE PRICE FIXING TO USE A CABLEWAY WITHOUT THE SAFETY DEVICES REQUIRED BY THE GOVERNMENT CONTRACT;

3. AN AGREEMENT AS PART OF THE PRICE FIXING TO FRAUDULENTLY PROMISE JOINT AND SEVERAL PERFORMANCE;

4. THAT NOT ONLY DID THE ILLEGAL PRICE FIXING ALLOW DEFENDANTS TO WIN THE BID BY A VERY SMALL AMOUNT BUT THAT THE USE OF THE CABLEWAY WITHOUT THE SAFETY DEVICES AND THE FAILURE OF SEVERAL PERFORMANCE BY TWO OF THE DEFENDANTS WERE A DIRECT CASE OF THE DEATH OF SEVERAL CONSTRUCTION WORKERS, HUSBANDS OF PLAINTIFFS;

WHEN THE SAID DEATHS OCCURRED IN A JURISDICTION WHERE THE SPOUSES' INTEREST IN THE MARITAL RELATIONSHIP IS A PROPERTY RIGHT PROTECTED FROM INVASION?

The Lower Court said: "No".

Plaintiffs contend the answer should be: "Yes".

STATEMENT OF THE CASE

Plaintiffs' Bills of Complaint allege in Count III: (13, 27, 41)

"12. The four contractor defendants were competitors in the heavy construction field and engaged in interstate commerce in the United States.

"13. Prior to May 1, 1961, there was no contractual obligation between them in any way relating to the construction of the Yellowtail Dam.

"14. Each of the contractor defendants was capable of undertaking the construction of the Yellowtail Dam alone.

"15. That eight (8) bids by contractors engaged in interstate commerce where submitted on April 11, 1961 to the U.S. Government for the contract to construct the Yellowtail Dam.

"16. Since 1947, plaintiff had incorporeal property in the marriage partnership, a contractual and legal right recognized in the 48-101 R.C.M. 1947, 36-101 R.C.M. 1947, 36-110 R.C.M. 1947 and 36-128 R.C.M. 1947.

"17. The defendants and each of them had a duty to plaintiff to refrain from injuring said incorporeal property hereinafter referred to consortium and a particular duty to refrain from violating the Sherman Anti-Trust Law, 15 U.S.C.A., secs. 1 and 2.

"18. The defendant contractors violated the Sherman Anti-Trust Law, 15 U.S.C.A., secs. 1 and 2, on or about April 9, 10, 11, 1961 at Billings, Montana, by meeting through agents and employees and illegally fixing the price of a bid with the U.S. Government for the construction of the Yellowtail Dam in Montana.

"19. That said illegal price fixing allowed them to secure the contract with the U.S. Government at the bid price of $39,809,359.00, with the next bidder but $26,807.00 higher.

"20. That said illegal price fixing was a restraint on competition.

"21. That a breakdown of competitive conditions in the construction industry endangers construction safety and the ability of the federal government particularly to hire contractors with proper equipment and adequate programs and safety personnel.

"22. That but for said illegal price fixing, the defendant contractors would not have secured the bid and could not have injured plaintiff's property in the manner set forth in paragraph twenty-two (22) of Count I.

"23. That pursuant to the illegal conspiracy, the defendant contractors fraudulently promised the U.S. Government that they would severally perform the provisions of the contract when they intended at all times to merely perform in a joint capacity.

"24. That this act of the conspirators allowed them to reduce their bid estimate by more than $26,807.00, thereby securing the bid.

"25. That Kaiser and Walsh had previously been prohibited during the construction of the Detroit Dam by the U. S. Government from using manships to carry personnel on cableways and the failure of the conspirators to perform severally was a proximate cause of injury to the plaintiff's marriage partnership and consortium.

"26. That pursuant to the illegal conspiracy to fix the bid price, the defendant contractors intended to use the cableway in question without safety devices for transporting personnel, thereby saving several hundred thousand dollars.

"27. That pursuant to said illegal price fixing conspiracy, defendant contractors fraudulently promised the U.S. Government that they would use safe equipment when two of the co-conspirators had operated the same cableway at Greers Ferry Dam in Arkansas in violation of the government contract there, and knew that the safety devices required were lacking from the cableway and stood to profit from its purchase and sale.

"28. That this aspect of the illegal price fixing conspiracy was a proximate cause of plaintiff's injury to the marital partnership and consortium in that the death of plaintiff's decedent would not have occurred but for the absence of safety devices required on safe cableways.",

and further alleges that the aforesaid acts were the proximate cause of death of a construction worker in the course of his employment and that said construction worker was plaintiff's spouse, and that the respective marital relationships were destroyed.

There is abundant deposition testimony to support each allegation of the Bills of Complaint but there has been no trial of the cause.

The lower court, without regard to any evidentiary considerations, granted defendants' motions for summary judgment opining that a cause of action was not stated and these appeals were taken.

ARGUMENT

INDUSTRIAL SAFETY IS ONE OF THE BROAD SOCIAL BENEFITS TO SOCIETY FROM A COMPETITIVE ECONOMY AND A CAUSE OF ACTION FOR TREBLE DAMAGES UNDER THE FEDERAL ANTI-TRUST LAW IS STATED BY PLAINTIFF WIVES OF CONSTRUCTION WORKERS KILLED IN A JURISDICTION PROTECTING MARITAL PARTNERSHIP FROM INVASION IN A BILL OF COMPLAINT WHICH ALLEGES:

1. ILLEGAL PRICE FIXING BY GIANT COMPETITOR DEFENDANTS TO FIX THE PRICE OF A FORTY MILLION DOLLAR GOVERNMENT CONSTRUCTION CONTRACT;

2. AN AGREEMENT AS PART OF THE PRICE FIXING TO USE A CABLEWAY WITHOUT THE SAFETY DEVICES REQUIRED BY THE GOVERNMENT CONTRACT;

3. AN AGREEMENT AS PART OF THE PRICE FIXING TO FRAUDULENTLY PROMISE JOINT AND SEVERAL PERFORMANCE;

4. THAT NOT ONLY DID THE ILLEGAL PRICE FIXING ALLOW DEFENDANTS TO WIN THE BID BY A VERY SMALL AMOUNT BUT THAT THE USE OF THE CABLEWAY WITHOUT THE SAFETY DEVICES AND THE FAILURE OF SEVERAL PERFORMANCE BY TWO OF THE DEFENDANTS WERE A DIRECT CAUSE OF THE DEATH OF SEVERAL CONSTRUCTION WORKERS, HUSBANDS OF PLAINTIFFS.

A.

INTRODUCTION

This is a case of first impression anywhere.

Plaintiffs seek recovery of treble damages from the defendants alleging:

1. Illegal price fixing;
2. Plaintiffs within "target area of protection";
3. Proximate cause;
4. Acts of defendants which could potentially affect competition;
5. Damage to property of plaintiffs.

B.

RIGHT OF RECOVERY

The Clayton Anti-Trust Law provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damage by him sustained and the cost of the suit including a reasonable attorney fee." 38 Stat. 731 (1914), 15 U.S.C. Sec. 15 (1958).

Price fixing is contrary to a policy of competition underlying the Sherman Act and its illegality does not depend upon a showing of its unreasonableness since it is conclusively presumed to be unreasonable.

See *U.S. v. McKesson & Robbins, Inc.* (N.Y. 1958) 76 S. Ct. 937, 351 U.S. 305, 100 L.Ed. 1209; *Northern Pac. Ry. Co. v. U.S.* (Wash. 1958) 78 S.Ct. 514, 356 U.S. 1, 2 L. Ed. 545.

The machinery employed by a combination for price fixing is immaterial to a determination of illegality and whether motives are good or evil, whether price fixing is accomplished by express contract or by more subtle means, whether participants possess market control, whether amount of interstate commerce is large or small or whether agreement is to raise or lower prices is irrelevant to a determination of the illegality of a combination.

See *Sun Oil Co. v. F.T.C.* (CCA 7, 1965) 350 F^2 624 cert. den. 86 S.Ct. 559, 382 U.S. 392, 15 L.Ed. 473.

C.

PRICE FIXING OF BID, PER SE VIOLATION

It is a violation of the federal anti-trust laws for giant competitors to meet together and jointly fix the price of a bid. Price fixing is a per se violation.

> "There is no firmer rule of anti-trust law than the rule that price fixing is per se unreasonable. The rule is designed to protect price competition is ranked high in importance by those who sustain our anti-trust policy. On no anti-trust subject has the Supreme Court spoken with greater certitude or frequency. As earmark of free enterprise, high regard for price competition is both a basic part of our intellectual economic heritage and a reflection of our self-oriented materialism. Remove it, and competitive enterprise would lose much of its meaning. Eliminate the per se price fixing rule, and anti-trust policy would be nearly unrecognizable."
>
> Symposium on Price Competition and Anti-Trust Policy, 57 Northwestern University Law Review 137.

"The prices submitted in the various bids must be arrived at independently by each of the bidders; other-

wise there may be a violation of the federal anti-trust laws."

U.S. Government Contracts and Sub-Contracts, by The Joint Committee on Continuing Legal Education American Law Institute, ABA 1964.

"Avoid premarital understandings, agreements between the parents with respect to prices. . . ."

9 Anti-Trust Bulletin 231.

D.

TARGET AREA OF PROTECTION

In determining whether the injury is collateral to or proximately caused by the violation, a trilogy of cases decided by the Court of Appeals for the Ninth Circuit cases is apposite. In *Conference of Studio Unions v. Loew's, Inc.*, (CCA 9, 1951) 193 F^2 51, the court held:

"In order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws." (193 F^2 at 54-55)

This case was relied upon in *Karseal Corporation v. Richfield Oil Corporation,* (CCA 9, 1955) 221 F^2 358. The court there stated:

"Turning now to the cases concerning the 'target area' of proximate causation, the rule is that one who is only *incidentally* injured by a violation of the anti-trust laws, — the bystander who was hit but not aimed at, — cannot recover against the violator. (citing cases)." (221 F^2 at 363) (Emphasis in original)

Finally, in *Twentieth Century Fox Film Corporation v. Goldwyn,* (CCA 9, 1964) 328 F² 190, the court stated with reference to the *Karseal* opinion:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then know to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." (328 F² at 220).

See also The "Injury" And Causation Elements of a Treble-Damage Anti-Trust Action, by Pollack, Aug. 1962 Reports (Vol. 21), Section of Anti-Trust Law, American Bar Association.

E.

INDUSTRIAL SAFETY IS ENDANGERED BY A BREAKDOWN OF COMPETITIVE CONDITIONS IN THE CONSTRUCTION INDUSTRY

One of the most substantial benefits from competition in a free enterprise economy is the industrial safety. It is particularly so in an inherently hazardous industry such as heavy construction. Approximately one million dollars of a forty million dollar contract such as Yellowtail Dam goes for safety, workmen's compensation and liability insurance.

Industrial safety pays and a competitive market therefore is a guarantee of a progressively lower accident frequency rate and injury severity rate. It is axiomatic that a breakdown of competitive conditions allows companies to disregard safety as markets are divided up.

See: "Safety" by Wendell Blair, Handbook of Heavy Construction, McGraw Hill (1959); "It's Time To Re-

Evaluate Our Safety Effort'' by Howard Latham, Chief of Safety Bureau of Reclamation in Constructor-Technical Journal of the Associated General Contractors of America (June, 1967) in Appendix.

The lives and marital relationships of construction workers are therefore in the ''target area'' which defines proximate causation in the anti-trust field.

If the Court were to say otherwise in the case at bar, it would be placed in the position of saying that the losing bidders had a cause of action for twelve million dollars plus, not because they were injured to that extent, but rather, that it was in the interest of society to prevent giant competitors from fixing bid prices prior to even forming partnerships or joint ventures, while denying recovery of a few hundred thousand to widows of construction workers who were killed because of the illegal price fixing specifics which allowed the defendants to not only win the bid but also to agree to fraud and unsafe performance sufficient to allow them to cut the price in an amount so as to actually win the bid.

This Court has made abundantly clear that determination of the target area is decisive not only for purposes of causation but also determinative of who gets protection.

F.

PLAINTIFFS' PROPERTY RIGHTS

> ''Intangibles, consisting of rights not related to physical things are merely relationships between persons, natural or corporate which the law recognizes by attaching to them certain sanctions enforcible in the courts. Such rights are incorporeal property.''
>
> 42 Am. Jur. 194.

See also *Curry v. McCanless,* 307 U.S. 357, 83 L.Ed. 1339, 59 S.Ct. 900; and *Transcontinental Oil Co. v. Emmerson,* 298 Ill. 394, 131 NE 645.

> "Section 4 (of the Clayton Act) has a broader sweep. It provides that any person who shall be injured in his business or *property* . . . . . may sue. (Emphasis added in case)
>
> "The majority of cases cited by the defendant do not avert to the distinction between 'business' and 'property' for the simple reason that that distinction was not in issue in those cases as it is here.
>
> "The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. Less is required to prove 'property' than to prove 'business'.
>
> "The word 'property' is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether the plaintiff has 1. property involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses property."
>
> *Waldron v. British Petroleum Co.,* 231 F. Supp. 72, 86 (1964).

Plaintiffs since 1947 have had by statute contractual and legal incorporeal property rights in the marriage partnership in Montana.

The extent of judicial sanction to protect those rights from invasion and definition of the kind and quality of those rights is best expressed in *Dutton v. Hightower & Lubrecht Const. Co.,* 214 F. Supp. 298 (Mont., 1963) by Judge Murray sitting in a diversity case.

> "The right of the wife to consortium in Montana is created and found in other sections of the Montana Code and particularly Sec. 48-101 R.C.M. 1947, which provides that marriage is a personal relation arising

out of a civil contract, and Sec. 36-101 which provides that in the marriage contract the *husband and wife contract toward each other obligations of mutual respect, fidelity and support.* In Wallace v. Wallace, 85 Mont. 492, 516, 279 P. 374, 382, 66 ALR 587, the Montana Supreme Court specifically held that '(i)n addition to support, a wife is entitled to the aid, protection, affection and society of her husband', all elements embraced within the meaning of the term 'consortium'. It is thus perfectly clear that, regardless of what rights a wife may or may not have acquired by virtue of her marriage under the common law, under the statutory law of Montana expressed in Secs. 48-101 and 36-101, R.C.M. 1947, a woman by her marriage obtains a contractual right to consortium."

Dutton, supra, at page 300.

G.

RULES FOR SUMMARY JUDGMENT

The rules to be followed in determining when summary judgment should be granted may be summarized as follows:

1. Summary judgment is proper only where there is no genuine issue of fact or where viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law In other words, there is then no genuine issue of a material fact.

2. All doubts as to the existence of a genuine issue as to any material fact must be resolved against the moving party.

3. An issue of fact may arise from countering inferences which are permissible from evidence accepted as true.

4. The court may not weigh evidence or resolve issues in determining a motion for summary judgment.

5. Issues of negligence are not ordinarily susceptible of summary judgment, but summary judgment may be proper on the basis of extraneous materials that do not involve any real issue of credibility and which clearly establish that there is no genuine issue of material facts as to certain controlling matters.

See *Cameron v. Vancouver Plywood Corporation,* (CCA 9, 1959) 266 F^2 535, 539; *Consolidated Electric Co. v. United States for Use of Gough Industries, Inc.,* (CCA 9, 1966) 355 F^2 437, 438; *United States for Use of Austin v. Western Elec. Co.,* (CCA 9, 1964) 337 F^2 568, 575; Wright, Federal Courts (1963) § 99; 6 Moore's Federal Practice 2584-5, para. 56.17(42).

CONCLUSION

The plaintiffs have pleaded, as persons within the target area of protection, property damage proximately caused by acts forbidden by the anti-trust laws. The factual allegations by plaintiffs must be accepted as true upon a summary judgment hearing and the lower court erred in dismissing Count III of Plaintiff's Third Amended Complaint.

RELIEF

Plaintiffs respectfully request that the judgment of the lower court be reversed and the causes returned to the District Court for trial with costs of these appeals to plaintiffs.

Respectfully submitted,

Marcus, McCroskey, Libner, Reamon, Williams & Dilley

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Lee Overfelt
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

(s) Harry M. Philo
Attorney

APPELLANTS' APPENDIX

Chapter 32

SAFETY

WENDELL R. BLAIR

CONTENTS

Accident Rates 32-1

Insurance 32-3
Workmen's Compensation; Public Liability and Property Damage; Cost and Savings; Hidden Costs of Accidents.

Planning for Safety 32-4
Who Does the Safety Work? Locating Hazards; Make the Job Safe; Accident Records.

Accident-prevention Program for Construction 32-11
Method of Obtaining Objectives; Management Participation; Safety Engineer; Safety Meetings; Accident Reporting and Investigating; Safety Equipment; Safety and the Working Force.

ACCIDENT RATES

Construction has become the largest industry in this country today, with approximately 365,000 or more contractors in business.

Construction has also become highly specialized; witness the large number of specialty contractors bidding for jobs at any bid letting. However, with this specialization has also come increased hazards, higher insurance rates, higher awards by the courts on claims, and greater financial losses to the contractor.

While other industries have met this challenge and taken corrective action to reduce accidents within their various industries, the records of the National Safety Council would indicate that the progress of the construction industry

along these lines has not kept up with their increase in size.

It will be noted in Table 32-1 that, where the average accident-frequency rates for all industries have steadily decreased, the accident-frequency rates for construction have increased. The same increase is also noticeable in the accident-severity rates for construction.

The contractor is no longer in a position to let the men take care of themselves in this highly hazardous industry. Since the enactment of workmen's compensation acts, or laws, by the states in the United States, the contractor has had to furnish some form of legal protection, namely, compensation insurance to protect his company against legal action for losses due to accidents occurring on the job.

Too many contractors are unaware of the influence a bad accident experience has on his bidding a job. [Emphasis added]. They are either not interested or are uninformed

as to what the extent of their liability is where it concerns the workman or the general public and tend to leave it up to their insurance carrier to be responsible for the accidents that occur, thereby leaving themselves open to a possible policing action by various city, state, or Federal enforcement agencies.

Table 32-1. Construction Injury Frequency Rates as Reported to National Safety Council

	1953	1954	1955	1956
Construction	15.68	17.29	19.33	19.10
National average	7.44	7.22	6.96	6.38

Of 40 different industries reporting accident-frequency rates annually, construction has placed thirty-sixth in each of the above years.

Source: National Safety Council, "Accident Rates."

After 20 years of experience in heavy-construction work, the Safety Department of the Construction Division of E. I. du Pont de Nemours & Company has developed facts that indicate that accidents on construction are expensive, as indicated below:

Total cost of project	$1,000,000
Of which labor amounts to about	$500,000
Man-hours (2.50 per hour)	200,000
Accidents normal to 200,000 exposure hours at the rate of 45 per 1,000,000 exposure hours*	9
Direct cost of each major injury, medical	$500
compensation†	250
	$750
Direct cost of 9 major injuries, 9 × 750	$ 6,750
Indirect cost, 4 times direct cost‡	27,000
Direct and indirect costs per $1,000,000 of construction	$33,750§

* From U.S. Bureau of Labor Statistics.

† Experience of an organization having much safety. (Industry average could more approximately be used, 128 days at $30 per week equals $540.)

‡ From National Safety Council and experience of the author.

§ Excludes costs of injuries involving lesser severity than "lost time cases."

This chapter will set forth some of the fundamental concepts of safety and the need for an accident-prevention program on either the large or small construction job. An accident-prevention program is not something that can be established as a book of rules, but rather it is a concept of a lot of people working together for a common cause, e.g., the prevention of human suffering, loss of life, damage to equipment, or injury to the public and the subsequent loss in dollars and cents.

While all safety or accident-prevention programs are basically the same, whether they are for the small home builder, the contractor that builds the large dams, or those who construct the miles of highway, the success of the program is in the administration of such a program designed for the particular job at hand.

In other chapters, detailed information has been compiled on how various operations of a construction job should be carried on, and it will be noted that *cost* has been a large factor in the planning of any stake or operation on the construction job. Therefore, the safety and well-being of the employees on the job and the general public as well should be given the same consideration by management in the direct planning of any construction job or operation.

The head of a construction organization is just as responsible for the safety of his personnel as he is for the ultimate finished job and the profits that will be derived from that job. In recent years great strides have been made in the technical skill and job methods used by contractors generally, but they have failed to apply these

abilities to the reduction of accidents as borne out by the consistently high number of construction accidents reported each year.

Safety is a management responsibility, and the paying of an insurance premium does not relieve that responsibility, either from a moral or a financial standpoint.

INSURANCE

Workmen's Compensation. The average contractor does not realize the influence that a bad accident experience can have in bidding a job. Too many contractors feel that their insurance costs are too high, because it is something that is required by law, and therefore take the "head in the sand" attitude of doing nothing about it, primarily because they do not realize that this cost can be materially reduced by maintaining an effective accident-prevention program that will keep the accidents on their jobs at a minimum. [Emphasis added].

Under the various acts or laws covering workmen's compensation in most states, the commissioner or director of insurance sets what are known as manual rates on all the

various job classifications, such as carpenters, welders, masons, etc.

Practically all states have an experience-rating plan that is applicable to contractors carrying on operations within the state. Through this plan, a contractor who has an effective safety program and a low accident experience can receive benefits of a certain reduction below the established manual rate—a *credit* rating—while those contractors who do nothing toward reducing the accidents that are occurring to their employees would subsequently pay an increased premium above the manual rate—a *debit* rating; there are known instances where this rate has equaled double the manual rate.

Once a contractor qualifies for the experience-rating plan, this qualification is his established rating plan and must be used by all insurance carriers that carry his coverage, thereby eliminating the possibility of a contractor trying to get a better rating as a cover up for a bad accident experience by changing insurance carriers. The contractor with a bad debit rating has no alternative but to take corrective action to reduce the accidents that are occurring to men in his employ.

Public Liability and Property Damage. The contractor buying insurance should have the expert council of an agent or insurance carrier who will explain the different types of coverages that are best fitted to the specific types of work he will be performing. In this way, he will be assured of getting the best rates applicable to the hazards of the job.

Cost and Savings. In all bidding, insurance costs and accident experience are a major factor when considering qualified contractors. Job bids can be won or lost as a result of a contractor's insurance costs based on accident experience. On a million-dollar job, the compensation insurance costs can vary from $5,000 to $15,000; on one job ($6,500,000) the difference in the compensation insurance premium based on the estimated payroll between the low and high bidder amounted to $60,000, or a difference of 28 per cent credit and a 27 per cent debit rating. These savings have been the difference between a profit and loss on numerous large jobs. One contractor reports that when

he had finished a large public garage his profit had decreased to such a point that it was hardly noticeable, but when he was presented a check for $45,000 as a return premium by his insurance carrier, it was the best profit he had ever realized; all because of an exceptionally good accident-prevention program.

Hidden Costs of Accidents. From job to job, the hidden costs and accidents will vary greatly, depending upon the type of operation, the locality, and the time of year. In analyzing the costs of accidents, the contractor must take into consideration the following factors:

1. *Downtime of men and equipment*
2. *Interference with operations*
3. *Spoiled work, damage to equipment, cost of replacement*
4. *Effect of accidents on the workmen, because of sympathy for the injured man*
5. *Investigation time by company personnel*
6. *Incidental factors: reputation, obtaining and hiring of new employees, etc.* [Emphasis added].

32-4 GENERAL

In the above list of items there is no mention of the cost of insurance premiums or the medical or compensation costs because those figures are considered actual costs as the result of any accident.

Were the contractor to take the above list and place the total cost of all items against the actual accident costs of any accident, he would find that the proportion would be approximately 6 to 1 hidden costs over actual costs. In past years the proportion was 4 to 1, but as previously mentioned, with increased wages, increased cost of equipment, increased compensation payments and higher awards by the courts, the totals now assume the higher figures.

PLANNING FOR SAFETY

Ninety-eight per cent of all accidents are preventable, and the contractor should assume his responsibility of see-

ing that the work place is as safe as is humanly possible. [Emphasis added].

During the planning stages of every job, any serious hazards that may be noticed should be brought to the attention of the contractor and his supervisory staff, with suggested safe ways of performing such hazardous operations.

Safety should be a definite part of any policies that may be established for the job, because safety effort can succeed only if those with final authority really want to reduce the number of accidents that might occur.

* * *

(Technical Publication Monthly of Associated General Contractors of America)

IT'S TIME TO RE-EVALUATE OUR SAFETY EFFORT

*by Howard S. Latham**

I'M MOST appreciative to have this opportunity to discuss safety in the construction industry. Reclamation is responsible for the administration of a public works program involving an expenditure of 300 million dollars annually for development of water resources and hydropower for the West. We are proud of the fact that almost 100 per cent of this construction is performed by private contractors on a competitive bid basis; also that approximately 90 per cent of the costs of the projects built by Reclamation are repaid to the Federal Government, most with interest.

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* *Mr. Latham is chief safety engineer, Bureau of Reclamation, U. S. Department of Interior. These remarks were made at the J. D. Marshall Training Conference of AGC last month.*

As a result of this close relationship with the contractors and the associations representing them, we share many of the problems as well as the public criticism and indictments which are often leveled against the industry. A persistent criticism of the construction industry has been its poor accident record. Year after year the industry suffers one of the highest injury rates, claiming an average of 2,600 lives and contributing to over 200,000 disabling injuries annually.

Inroads in Profits

I know you must be concerned with this problem which plagues the industry and causes embarrassment. You are certainly aware of the inroads made on profits by reason of the direct cost of workmen's compensation insurance, the loss of equipment and material, unscheduled delays, together with the loss of production and efficiency. *With the full realization of the fact that the increased expense resulting from poor safety records is passed on to the owner in increased building costs, reflected in higher bids—Reclamation is concerned.* [Emphasis added].

Compounding this is the increasing number of tort claims being brought against the Government on the allegation that the Federal Agencies failed to provide a safe work environment and were negligent in the enforcement of safety standards. As a result, we're both being "tarred with the same brush"—economically and reputation-wise.

You doubt it? Let me quote a passage from the current edition of the *Lawyers Desk Reference,* authored by Dean Robb and Harry Philo, both prominent and influential claims attorneys: "Construction safety in the United States today is almost wholly dependent upon the philosophy, competence and will of the safety personnel of the United States Army Corps of Engineers and the Bureau of Reclamation. The Northwest Division of the Corps of Engineers, headquartered in Portland, Oregon, is the only District that appears to have all three.

Could Prevent Million Injuries

The time which the Bureau of Reclamation spends rationalizing negligent conduct could much better be spent

saving lives by insisting on Government contractors with safe equipment, competent safety personnel, and adequate safety programs, and by developing safe systems of work and safe design of machinery and equipment. Such an approach would probably save the lives of ten thousand workers and prevent injury to one million in the next ten years."

Obviously, that allegation is not true because Reclamation contractors are enjoying comparatively good accident records—the average accident frequency rate over the past 3 years is 13.4, which is less than half the current industry-wide average. Also, reclamation has pioneered in the establishment of progressive—and practical—construction safety standards: Bureau contractors can—and often do—attest to the aggressive efforts of our safety and inspection personnel in attempting to insure compliance with these standards.

Grossly exaggerated is the inference that Reclamation controls a preponderance of the Nation's construction, and that construction safety in the United States is largely dependent upon our philosophy, competence, and will. Reclamation's $300 million annual construction expenditure, while important, is only a fraction of the Nation's total annual construction expenditure of $50 billion plus. Likewise our average construction accident rate over the past 10 years amounted to 11 fatals and 300 disabling injuries a year. However, Robb and Philo appear to be convinced that the tail should wag the dog.

Cause for Concern

Discounting the indictment that the construction industry and those associated with it are disposed to be complacent and irresponsible in their safety efforts, there is reason to be genuinely concerned with the current accident record in the industry. And it is sobering to realize that the statistics reflect loss of life, injuries, waste, inefficiency and delay.

Let's face it—we are all involved: Contractors, labor, the owners, and Government. And, even from the most tolerant appraisal of the record, it is evident that greater emphasis must be placed upon improving the safety record

in construction. While the industry is not negligent as charged, it is evident that many of us have not worked hard enough to improve the safety record. Further, our efforts—regardless of their sincerity—have often been misdirected or ineffective.

Our immediate objective should be to stimulate new and more vigorous action at all levels toward a more constructive approach to safety in construction. The contractors and contractor associations should spearhead these efforts—since they have the means and are most affected by the success or failure of these efforts. With this in mind, I would like to share some of the concepts of effective safety management incorporated in the Bureau of Reclamation's construction program.

Primarily, we desire contractors who believe and indicate by their actions that safety is an integral part of the work—are convinced that safety is sound economy—and, as a result, take the initiative in formulating and conducting an aggressive safety program. This is based upon the premise that it is their industry, their employees, their insurance premiums, their financial gain or loss—and primarily their legal and moral responsibility.

However, there are specific provisions incorporated in all Reclamation contract specifications which we consider essential to an effective contractor safety effort. Since you are familiar with the essential criteria for an effective safety effort; I'll merely summarize them: [Emphasis added].

Establishment of a bona fide safety program embodying company policy and incorporating specific safety requirements pertaining to all work engaged in by the firm. I want to emphasize that no safety program is worth the paper it is printed on unless top management gives it full backing and line supervisors are made to understand the importance of getting workers to comply with the safety requirements.

Provision should be made for responsible and competent safety supervisor—either a career safety engineer or designation of a key supervisor—depending upon the size and nature of the job.

Provision for adequate first-aid and medical facilities, together with trained personnel to provide prompt and efficient first-aid and medical attention for injured employees. Every foreman should be required to possess either a U. S. Bureau of Mines or American Red Cross firstaid certificate.

Provision for continuing safety education at all supervisory and operational levels. This educational program must, as a minimum, provide for monthly supervisory safety meetings and weekly tool-box safety meetings conducted by the foreman and attended by every workman on the job.

Supervisor Training Needed

Probably the most pressing need is for an effective safety training program for construction supervisors—foremen and superintendents. The Associated General Contractors of America has attempted to meet this need through the development of a "Safety Training Course for Construction Supervisors." This training fills a need of long standing in the construction industry. While a commendable start has been made, I don't believe the AGC nor the contractors have tapped the full potential of this course. It is not enough to train key supervisors at chapter headquarters. This essential safety education program should be expanded and made available to all contractor supervisors including craft foremen and general foremen on all construction jobs. Reclamation is sold on the AGC course to the extent that we require every construction inspector to complete this training. To date over 900 construction inspectors have completed the course, conducted on the various jobsites.

Acceptance and compliance with established health and safety standards. These safety standards, relating to construction activity, are encountered in various forms. There are state safety orders constituting a legal obligation on the part of the contractor for compliance—and, incidentally, this obligation applies to contractors doing work for Reclamation. Several Government agencies, including Reclamation, incorporate safety standards in their contract

specifications: These represent a contractual obligation on the part of the contractor for compliance. Safety standards pertaining to construction are also available from: The United States of America Standards Institute—who are presently revising and enlarging the AIO Code covering construction—The Associated General Contractors of America, and the National Safety Council.

I'd like to make one more comment about safety standards for the construction industry. I've heard contractors gripe or complain about State and Federal agency standards—"They are too stringent, impractical, not applicable, and so forth." I've been guilty of this myself, and there is probably considerable truth in many of these complaints.

However, there is a solution to this—too seldom exercised by contractors. Contractors should take the time and expend the effort to participate in the formulation of these standards. Participation is available through contractor associations, the Construction Section of the National Safety Council, the United States of America Standards Institute, and at review hearings called by the various state industrial commissions. While such participation requires time and effort, it is essential if construction safety standards are to reflect the needs and desires of the industry. There's an old saying: "If you can't beat them, join them." I'd suggest you join.

I'd like to leave one last thought for your consideration: Let's Start by Preventing the Accidents that Kill!

In reviewing the fatalities which occurred on Reclamation construction during the past three years we found that 20 of the 24 fatal accidents resulted from the operation of construction equipment. Rubber-tired equipment, scrapers, bottom-dump and end-dump trucks were involved in 10 of these fatal accidents. Mobile cranes accounted for seven more.

Control equipment accidents, particularly truck and crane accidents, and the construction industry will be well on the way toward achieving a safety record it can live with—and afford. How?

Design. Increased consideration for the health and safety of the operator and others should be provided in the de-

sign of heavy equipment. For example, the failure of the air-braking systems contributed to 4 of the 10 fatalities which involved rubber-tired hauling equipment. Unfortunately, as you know, similar failures occur frequently throughout the industry. Dual or emergency braking systems would have prevented many of these accidents.

New Standards Under Review

Reclamation's revised construction safety standards, presently being reviewed by The Associated General Contractors of America, the Society of Automotive Engineers, equipment manufacturers and others, will require emergency braking systems on all off-highway, pneumatic-tired, earthmoving equipment having a struck capacity of 15 cubic yards or greater, manufactured after January 1, 1968. Additionally, equipment of this type, manufactured after 1965 will be required to be equipped with roll-over bars or canopies and seat belts installed in the cabs for use of the operators.

I was personally pleased with the general acceptance of these provisions as indicated by the AGC, the manufacturers of equipment and others. However, I believe that the contractors, through their contractor associations and individually, should insist on these safety features on all new equipment. The industry cannot permit safety to be optional. Today the alternative will be to face the wrath of Congress; public ridicule by the Robbs, Philos and Naders; and the censure of your own conscience.

In our evaluation of equipment design, we can't afford to overlook the problem of environmental health. I'm speaking of designing for the elimination or reduction of excessive noise, harmful dusts, and extreme temperatures. I'm personally convinced that air-conditioned cabs on heavy equipment operated in hot climates is not too far in the future. Noise abatement, achieved by relocating exhaust ports or by the installation of sound barriers or absorption material, should be undertaken now.

These improvements are necessary and are comparatively inexpensive when compared with the overall cost of equipment. Further, dollars expended in this manner will

be returned tenfold in increased production and reduced accident costs.

Maintenance. Preventive maintenance, with provision for tagging and deadlining faulty equipment, is essential to an effective safety effort. This is all too often neglected under the dangerous and uneconomical pretense of delaying production.

Operator Qualification and Training. This need is probably the most important and usually the most neglected factor in safe equipment operation. To be effective, both management and labor must participate in this program, involving provision for training new operators, checking out operators when they are hired, insuring that operators are physically qualified, together with provisions for on-the-job safety training and education.

I doubt that any of us entertain any doubt as to the need to re-evaluate our safety effort. Casual reflection will disclose how significant accident experience is in relation to the construction industry: Its effect upon our ability to achieve a quality product—on time—with optimum safety and at a profit.

I've presented a few basic safety concepts absolutely necessary to achievement of a good safety record—all requiring initiative and the expenditure of time and effort on the part of those in the industry—and all capable of achievement by any reasonably competent management. Those of us in the construction industry can reaffirm our Skill, Responsibility, and Integrity by pinpointing these concepts or objectives for accomplishment—NOW!

In order to emphasize the necessity for action. NOW, I'd like to leave you with this quote from an unknown author:

> "The Tarantula sat on the Scorpion's back,
> And he chuckled with ghoulish glee;
> Says he, 'I must lick this son-of-a-such,
> Or, by gad, he'll lick me.' "

No. 21,986

In the

United States Court of Appeals

For the Ninth Circuit

ELSIE HAMMAN,

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees,

ARLENE HARTUNG REED, etc.

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees,

ANNA LOYNING, etc.

vs. *Appellant,*

U. S. A. and WASHINGTON IRON WORKS, et al.,

Appellees.

Brief of Appellees

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No. 21,986

In the

United States Court of Appeals

For the Ninth Circuit

ELSIE HAMMAN,	
vs.	*Appellant,*
U. S. A. and WASHINGTON IRON WORKS, et al.,	*Appellees,*
ARLENE HARTUNG REED, etc.	
vs.	*Appellant,*
U. S. A. and WASHINGTON IRON WORKS, et al.,	*Appellees,*
ANNA LOYNING, etc.	
vs.	*Appellant,*
U. S. A. and WASHINGTON IRON WORKS, et al.,	*Appellees.*

Brief of Appellees

Appellants' brief does not present an accurate picture of the nature of the claims on appeal, the matters before the District Court, and the issues involved in this appeal. Ap-

pellees are therefore compelled to set forth a statement in order that the consolidated cases may be viewed in proper perspective.[1]

STATEMENT OF THE CASE

1. Preliminary Statement.

This is an appeal from partial summary judgments (R. 69, 71, 73)[2] on Count III of three civil complaints filed by appellants as the personal representatives of the estates of their deceased husbands claiming treble damages under sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U. S. Code, secs. 1, 2, and 15; R. 3, 17, 31).[3]

Counts I and II of the complaints are survival actions for personal injuries to the decedents and for their wrongful deaths as the result of an accident occurring on or about March 6, 1963, while decedents were employed by appellees as construction workers during the construction for the United States of the Yellowtail Dam in the County of Big Horn, Montana (R. 4, 18, 32).

Count III of each complaint purports to allege a claim under sections 1 and 2 of the Sherman Act arising out of the same accident on March 6, 1963, which resulted in the deaths of the decedents (R. 3, 17, 31).

The District Court for the District of Montana, Honorable W. J. Jameson, Judge, granted partial judgments dismissing Count III of each complaint (R. 69, 71, 73) after

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1. Appellees (defendants in the court below) are Morrison-Knudsen Company, Inc., Perini Corporation, Walsh Construction Company, Inc., and Kaiser Company. Appellees together with F. & S. Contracting Company (not a party) formed a joint venture known as Yellowtail Constructors to build the Yellowtail Dam.

2. References to pages of the record are identified as "R." References to Appellants' Brief will be designated "App. Br."

3. The actions were consolidated for trial (R. 49). Each complaint including Count III is the same in essential allegations.

filing a memorandum opinion which thoroughly analyzed and considered appellants' allegations and contentions (R. 62-66).[4] The District Court reserved for further consideration questions under Counts I and II of the complaints relating to the immunity of appellees as employers from civil liability under the Workmen's Compensation Act of Montana (R. 49-61).

2. The Record.

Each complaint alleges that on or about March 6, 1963, the decedent (respectively, Orville Hamman, Adam Hartung, and Sidney A. Loyning), while in the course of his employment and while a passenger on a platform suspended by cables, was caused to be thrown from the platform and killed when two cables negligently designed, installed, inspected, and maintained snapped and broke (R. 4, 18, 32). The complaints further allege that defendant United States of America was possessor of the construction site and had contracted with appellees for construction of the Yellowtail Dam (R. 4, 18, 32). Defendant United States as owner of the land and the improvements is charged with negligence in failing to provide a safe place to work, in failing to employ competent contractors, in allowing the installation and maintenance of the cableway in an unsafe and hazardous manner, and in employing incompetent inspectors (R. 5, 20, 33). Defendant Washington Iron Works is alleged to have violated its duties to the plaintiffs in negligently designing, manufacturing, and installing the cableway (R. 5, 19, 32, 33). Appellees are charged with negligently installing and using the cableway without safety devices and with negligently failing to provide safe procedures, safe equip-

4. Judge Jameson's opinion is reported in 267 F. Supp 420, 429-432.

ment, and safe installation and operation of the cableway (R. 9-11, 23-25, 37-39).

Appellants further allege in paragraphs 23 and 24 of their respective complaints with respect to all defendants (R. 11, 25, 39):

> "23. That the aforesaid acts of negligence of each of the defendants was a proximate cause of plaintiff's decedent's death and plaintiff's injuries.
>
> 24. That plaintiff's decedent suffered conscious pain between the time of his initial injury and his death shortly thereafter."

In paragraph 25 of Count I of each complaint (R. 11, 25, 39) it is alleged that damages are sought under the Montana survival act for decedents' conscious pain and suffering and in addition all other damages which are fair and just for wrongful death as provided by the Montana Wrongful Death Act. Exemplary damages are also claimed (R. 12, 26, 40).

Count III of each complaint, on which judgment was granted to appellees in the court below, alleges that the contractor defendants, (appellees) were competitors in the heavy construction field in interstate commerce; that there were eight bids submitted to the United States for the contract to construct the Yellowtail Dam; that the contractor defendants were the low bidder at a bid price of $39,809,359; and that illegal price fixing allowed them to secure the contract with the U. S. government at this bid price with the next bidder but $26,807 higher (R. 13, 27, 41). Count III further alleges that but for the illegal price fixing the defendant contractors would not have secured the bid and could not have injured plaintiffs' (appellants') property (R. 14, 28, 42, para. 22); and that pursuant to the illegal conspiracy to fix the bid price defendant contractors fraudulently promised the United States to use safe equipment

but that they intended to use the cableway without safety devices; that this aspect of the illegal price fixing conspiracy was the proximate cause of injury to the marital partnership and consortium, in that the death of decedents would not have occurred but for the absence of safety devices required on the cableways (R. 14-15, 28-29, 42-43).

The District Court had before it the affidavits of Carroll F. Zapp, vice president and general counsel of appellee Morrison-Knudsen Company, Inc. (R. 87-98). The verified statements in Mr. Zapp's affidavit were not controverted by appellants and thus are to be accepted as true. The affidavits may be summarized as follows:

Appellees were joint venturers constructing the Yellowtail Dam. Before construction started on the Yellowtail Dam, the Bureau of Reclamation of the United States called for bids for the construction of the dam. In answer to this call appellees Morrison-Knudsen Company, Inc., Perini Corporation, Walsh Construction Company, Inc., Kaiser Company, and F. & S. Contracting Company as a joint venture submitted a bid to the Bureau of Reclamation (R. 88). On May 1, 1961, appellees executed a joint venture agreement for performing the contract with the United States (R. 90-A to 93). The joint venture was designated the Yellowtail Constructors (R. 91), and a certificate of assumed business name was recorded in the County of Bighorn (R. 88). The joint venture maintained workmen's compensation insurance and compensation is being paid pursuant to the compensation law to the dependents of the decedents (R. 89). The pay roll and all books and records of the joint venture are maintained separate and apart from the records of the members of the joint venture (R. 89).

The bid of the Yellowtail Constructors Joint Venture was one of seven bids submitted (R. 95). Its bid of $39,-

809,359 was the low bid. Another joint venture, Arundel Dixon group, was high bidder with a bid of $50,201,239 (R. 95). The engineers' estimate for the work was $47,830,638 (R. 95). Of the seven bidders, five were joint ventures (R. 95).

The use of joint ventures is well established and common in the heavy construction industry, particularly on multimillion dollar projects (R. 95). Commencing with the Hoover Dam in the early 1930s, large Federal Government projects have almost always been constructed by joint ventures of contracting companies (R. 95). Prior to the Hoover Dam in 1930 no American heavy construction company had the financial support, manpower, or equipment resources to undertake a project in the multimillion dollar class and no single bonding company had the financial capacity to write the necessary performance and payment bonds (R. 95).

Joint ventures promote competition in the construction industry (R. 95). Very few construction companies have the financial resources to undertake a construction project in excess of $10,000,000 and even fewer have resources to undertake a project in excess of $25,000,000 (R. 95-96). Through the means of a joint venture a group of smaller companies can pool their financial resources and a group of bonding companies can group their bonding capacities for the submission of a bid on a large project and for performance of the work if the bid is successful (R. 96). Federal and state governmental agencies have recognized that joint bidding as a joint venture increases the number of bidders and lower bids because smaller companies may join to submit bids (R. 96). The Bureau of Reclamation's engineers' estimate of cost was $47,830,638, more than $8,000,000 above the low bid of the Yellowtail Constructors. Only two of the seven bidders were higher than the engineers' estimate (R. 96).

The annual value of construction work in the United States now exceeds thirty billion dollars and no single contracting company has contract volume of more than one-half of one percent of this work (R. 96). Even the largest contracting firms can effectively estimate no more than 50 projects a year of the many thousands offered and if it were not for the joint venture form defendants as well as others in the industry would be limited to bidding on a select group of projects (R. 96). At times the Federal Government requests a number of construction firms to form a joint venture for the purpose of performing work under a negotiated contract on an urgency basis (R. 97).

Joint ventures are not continuing entities and are formed to bid on and perform, if successful, a definite project and are dissolved upon completion of the project (R. 97). Joint venture partners on one project bid actively and aggressively against their partners in that project on other projects. To the knowledge of deponent Zapp no question of restraint of trade or of collusive or of monopolistic practices has ever been raised by governmental authorities with respect to joint ventures in the construction industry and no such claim has ever been raised by the Department of Justice in claims proceedings or litigation between the Federal government and joint venture contractors or in any other connection (R. 97, 98).

QUESTIONS PRESENTED

Appellees do not agree that the questions presented by appellants are the questions on this appeal (App. Br. p. 2).

Question I does not present an issue in a private antitrust action, and neither an affirmative nor negative answer is relevant. Question II was properly answered by the District Court in the negative.

The questions involved in this appeal, as appellees see them, are:

1. Was the joint venture agreement of appellees to bid on the Yellowtail Dam Project a price fixing conspiracy prohibited by section 1 of the Sherman Antitrust Act (15 U. S. Code, sec. 1)?

2. Were appellants or their decedents directly and proximately injured in their business or property by reason of anything forbidden by section 1 of the Sherman Act?

Appellees submit that both questions should be answered in the negative.

SUMMARY OF ARGUMENT

Appellants have not alleged a cause of action under the antitrust laws.

Appellees' joint venture agreement to bid and the submitting of a joint bid to construct the Yellowtail Dam were not a price-fixing agreement or an illegal agreement prohibited by sections 1 or 2 of the Sherman Act.

Appellants do not allege injury to business or property by reason of anything forbidden by the antitrust laws. Appellants were not and could not be damaged by the alleged price-fixing agreement. The alleged fraudulent promises to the United States to perform severally and to use safe equipment are not offenses prohibited by the Sherman Act.

Even assuming an illegal agreement, appellants were not within the area of any alleged restraint and there was no injury proximately caused to the business or property of appellants by any act of appellees prohibited by the antitrust laws. Appellants are actually claiming damages for personal injuries and wrongful death and not for injury to business or property within the meaning of section 4 of the Clayton Act (15 U. S. Code, sec. 15).

There is no genuine issue as to any material fact, and the District Court appropriately granted the partial summary judgments on Count III of the complaints.

ARGUMENT

I. The Joint Venture Agreement to Bid on the Yellowtail Dam Was Not a Price Fixing Agreement.

Appellees formed a joint venture to submit a bid on the Yellowtail Dam Project and to enter a contract with the United States and construct the dam if the bid was low and accepted (R. 88).

Consideration of the reasons for the widespread use for many years of joint ventures in the construction industry and for their appproval by the Federal and state governments is apposite. A joint venture is formed to bid one job and perform the work if the bid is successful (R. 97). A joint venture allows contractors to bid on projects which they would not have the financial resources to bid alone. The capital requirements of a $40,000,000 project, as here, are beyond the means of most contractors. A joint venture enables contractors to bid on many more jobs. There is a division of risk in the high risk business of heavy construction. There is the contribution of the specialized experience and skills of the joint venturers in the complicated and diverse operations of constructing dams, tunnels, and hydroelectric installations, all of which may be included in one project. The effect of joint ventures is to increase the number of bidders on large projects since the participants could not bid the projects alone. The joint venture is an economic necessity in this day of huge, multimillion dollar projects. The seven bids on the Yellowtail Dam attest to the competitive bidding for the job (R. 94-97).

Appellants claim that the formation of the joint venture to bid on the Yellowtail Dam Project was *per se* unlawful.

The authorities are to the contrary. Joint ventures, particularly those formed for a limited purpose, are not *per se* unlawful. The Supreme Court in *United States v. Penn Olin Chemical Co.*, 378 U.S. 158, 12 L. Ed. 2d 775 (1964) considered the jointly owned corporation of Pennsalt Corporation and Olin Mathieson Corporation, formed for the production and marketing of sodium chlorate, to be a joint venture (378 U.S. at 165, 169). The court held that on the record there was no violation of section 1 of the Sherman Act as charged by the government (217 F. Supp. 110, 113). The fact that the agreement provided for the production and sale of a product at a price by two large competing companies acting as a joint venture did not call for the application of the *per se* principle although the government had charged a section 1 violation.

Syndicates which underwrite the issuance and sale of securities are joint ventures. In *United States v. Morgan*, 118 F. Supp. 621, Circuit Judge Harold R. Medina, presiding in the District Court, Southern District of New York, held that there was nothing in the cases which bound him to find the syndicate agreements to be illegal *per se* (118 F. Supp. at 689). The government claimed that the purchase by a syndicate of underwriters of a security issue from an issuer and its distribution to the public through dealers was the same as the purchase and resale of commodities with price restrictions down the line. The court held to the contrary stating that an underwriting syndicate is an *ad hoc* common enterprise, limited in number of participants, in purpose, and in duration, and that it is a reasonable business combination having the purpose and effect of efficiently promoting, rather than restraining, trade (118 F. Supp. at 690). The reasoning and decision by Judge Medina are applicable here. Joint ventures in the construction industries are *ad hoc* enterprises, limited in number of partici-

pants, in purpose, and in duration. Joint ventures have the effect of efficiently promoting, rather than restraining, trade.

The position of the Federal Government and the courts regarding the propriety of submitting a single bid on contracts by joint venturers is revealed by a series of consent decrees allowing joint venture bids where in absence of a joint venture the parties could not submit single bids or perform the contract.[5] If the entry into a joint venture for the purpose of submitting a single bid were price fixing and *per se* illegal, the qualification to the permission granted in the consent decrees would be irrelevant. The joint venture form of doing business almost invariably involves the joint production or sale of a commodity or service at price. The formation and conduct of such joint ventures are not illegal *per se* under the antitrust laws. On the contrary, joint ventures are recognized as a common form of business enterprise and are reasonable business combinations having the purpose and effect of promoting, rather than restraining, trade.

Appellants' purpose in charging a price fixing conspiracy appears on the face of the complaint. The alleged conspiracy is intended as a jurisdictional vehicle which is to carry their real claims for personal injuries and wrongful death and is intended to avoid the immunity of appellees as employers under the Montana Workmen's Compensation Act. The actual claims are alleged in the complaints to have arisen from a variety of causes including the negli-

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5. There are many such cases and the following are representative: *U.S. v. National Electrical Contractors Assn.* (D. N.J.) 1956 Trade Cases, Para. 68,534; *U.S. v. New England Concrete Pipe Corp.* (D. Mass.) 1959 Trade Cases, Para. 69,481; *U.S. v. General Electric Co.* (E.D. Pa.) 1962 Trade Cases, Para. 70,367; *U.S. v. Allen-Bradley Co.* (E.D. Pa.), 1962 Trade Cases, Para. 70,420; *U.S. v. Westinghouse Electric Corp.* (E.D. Pa.), 1962 Trade Cases, Para. 70,487; *U.S. v. General Electric Co., et al.* (E.D. Pa.), 1962 Trade Cases, Para. 70,488.

gence of appellees and the negligence of the United States and Washington Iron Works. In Count III, the proximate cause of the injuries is not alleged to be the price fixing conspiracy (and it could not be such a cause), but rather the failure to perform the promise to use safe equipment (R. 14-15, 28-29, 42-43, Par. 27, 28) and the promise of several performance (R. 14, 28, 42, Par. 23; App. Br. 5).

II. There Is No Allegation of Injury to Business or Property by Reason of Anything Forbidden by the Antitrust Laws.

Appellants seem to assume that allegation of a conspiracy automatically establishes injury.[6] This is diametrically opposed to the cardinal principle under the antitrust laws that a conspiracy in and of itself does not give rise to a private cause of action but that such right of action is based on injury to business and property by reason of a conspiracy forbidden by the antitrust laws. *Burnham Chemical Co. v. Borax Consolidated,* 170 F.2d 569, 571 (9 Cir. 1948), cert. denied 336 U.S. 949; *Suckow Borax Mines v. Borax Consolidated,* 185 F.2d 196, 208 (9 Cir. 1950).

1. THE ALLEGED ACTS ARE NOT FORBIDDEN BY THE ANTITRUST LAWS.

The Sherman Act, as the District Court has said (R. 66), "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce". *Hunt v. Crumboch,* 325 U.S. 821, 826, 89 L.Ed. 1954 (1945). Even if a price fixing conspiracy is assumed, appellants could not have been injured by it. It is axiomatic that a private litigant can only be injured by a price fixing conspiracy

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6. This is epitomized by their complaint and summary of argument alleging illegal price fixing, fraudulent promises to the United States, and alleged negligent installation, management, and inspection of a cableway by appellees, the United States, and the Washington Iron Works.

when the fixed price is higher than the "competitive" price would have been in absence of the conspiracy. *Wolfe v. National Lead Company,* 225 F.2d 427, 433 (9 Cir. 1955), cert. den. 350 U.S. 915 (1955); *American Sea Green Slate Co. v. O'Halloran,* 229 Fed. 77, 80 (2 Cir. 1915). But whether the bid was high or low, appellants and their decedents as construction employees could not be proximately injured by an alleged price fixing conspiracy in submitting a bid to the United States on a construction project. They were not purchasers of any product and had no property interest in the construction project.

Appellants attempt to bridge the gap by alleging breach of promises and commission of other torts: (1) a fraudulent promise to perform the contract severally when appellees intended to perform jointly; and (2) a fraudulent promise to the United States to use safe equipment when appellees intended to use unsafe equipment. To say that fraudulent promises are part of a price fixing conspiracy does not constitute them restraints under section 1 of the Sherman Act. In *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F.2d 283 (6 Cir. 1963), the court said at page 286:

> "In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the antitrust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311; Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 464; Hunt v. Crumboch, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954."

The alleged fraudulent promises to the United States and the use of unsafe equipment are not acts forbidden by the antitrust laws.

In *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 84 L.Ed. 1311, the court at page 483 said:

> "It is not denied, and we assume for present purposes, that respondents by substituting the primitive method of trial by combat, for the ordinary processes of justice and more civilized means of deciding an industrial dispute, violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal rights as Congress has conferred on petitioner by the Sherman Act and violence as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction."

And at page 512:

> "Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price or discriminate between its would-be purchasers.' "

The incorporation of a company to compete with plaintiff, the spreading of false reports concerning him and malicious prosecution are tortious acts but they are not forbidden by the antitrust laws. *Forgett v. Scharff,* 86 F. Supp. 128 (D. N.J. 1949). A conspiracy to injure plaintiff in his business of publishing, writing, distributing books, and selling food products by libeling, slandering him and by other unlawful acts to destroy his business are torts actionable under state laws but not under the antitrust laws. *Hohensee v. Akron Beacon Journal Publishing Co.,* 171 F. Supp. 90 (D. Ohio 1959); aff'd 277 F.2d 359 (6 Cir. 1960); cert. den. 363 U.S. 913. Tortious interference with sales of plaintiff's products and price cutting are not violations of the Sherman Act. *Sunbeam Corp. v. Payless Drug Stores,* 113 F. Supp. 31, 42 (N.D. Cal. 1953).

The alleged tortious acts of appellees in falsely promising the United States to perform severally and of installing and maintaining unsafe and defective equipment are not violations of the antitrust laws. These are the acts which appellants allege caused them damage, but they are not acts forbidden by anything in the antitrust laws.

Tepler v. Frick, 112 F. Supp. 245 (S.D. N.Y. 1952), aff'd 204 F.2d 506 (2 Cir. 1953), cited by the District Court (R. 66), was an action by a baseball pitcher against the Commissioner of Baseball for treble damages for personal injuries. The District Court held that the complaint did not show damages to plaintiff resulting proximately from acts constituting violation of the antitrust laws by the defendants. The Court of Appeals for the Second Circuit affirmed. Appellants here have alleged acts by appellees, but the acts are not those forbidden by the antitrust laws.

2. APPELLANTS WERE NOT WITHIN THE AREA OF ANY ALLEGED RESTRAINT.

If there was, as appellants claim, a price fixing conspiracy, appellants and their decedents could not have been injured thereby.

Appellants were clearly outside the "target area" as that term has been used by this court and other Federal courts as a factor in determining whether there was proximate causation. The cases of this court cited by the District Court in its Opinion (R. 65, 66) and by appellants[7] demonstrate clearly that no act of the alleged price fixing damaged appellants or their decedents and that the decedents were not "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry". *Conference of Studio Unions v. Loew's, Inc.* (9 Cir. 1951), 193 F.2d 51, 54-55. The alleged price fixing did not damage the United States because appellees were low bidders of seven. If there was damage, the damage would have been to the United States as owner of the project. Appellants and their decedents as employees were not in the area "which it could be reasonably foreseen would be affected by the conspiracy". *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F. 2d 190, 220 (9 Cir. 1964). Appellants attempt to surmount this hurdle by alleging that appellees conspired to use unsafe equipment and to perform severally instead of jointly. But these alleged conspiratorial acts are not, as we have seen, forbidden by the antitrust laws. These acts may be torts cognizable under state law. The District Court found that the alleged injuries were collateral and not compensable under the Antitrust Act (R. 65). The authorities uniformly support the conclusion of the District Court.

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7. App. Br. pp. 9-10. *Conference of Studio Unions v. Loew's Inc., infra; Twentieth Century Fox Film Corporation v. Goldwyn, infra;* and *Karseal Corporation v. Richfield Oil Corporation* (9 Cir., 1955), 221 F.2d 358

The quotation from *Conference of Studio Unions v. Loew's, Inc., supra,* cited in appellants' brief (App. Br. p. 9) is apposite. In addition to allegations of a conspiracy in restraint of trade a plaintiff must show an act has been committed which harms him and that he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. If he fails to do so, he is not injured "by reason of anything forbidden in the antitrust laws". Appellants have failed to make any such allegations. The purpose of the alleged conspiracy was price fixing in submitting the bid. Such an act could not conceivably have caused the accident which resulted in the deaths of appellants' decedents on the allegedly defective cableway. If the alleged price fixing conspiracy is assumed to have caused a breakdown in the competitive conditions in the construction industry, appellants' decedents as construction workers were not thereby affected so far as their personal safety was concerned. It could not be reasonably foreseen or foreseen at all that the price fixing with which appellees are charged could be in any way connected with an accident on the job during construction.

Even in those cases where plaintiffs' loss resulted from an impairment of a business relationship with another entity which was the object of the conspiracy, recovery has been uniformly denied. The losses have been designated as "secondary" or "derivative" and not those arising by reason of a violation of the antitrust laws. Officers and employees of an injured corporation *(Bookout v. Schine Chain Theatres, Inc.,* 253 F. 2d 292, 2 Cir. 1958; *Martens v. Barrett,* 245 F.2d 844, 846, 5 Cir. 1957); a stockholder of an injured corporation *(Goldsmith v. St. Louis Railway,* 201 F. Supp. 867, D. N.C. 1962; *Petersen v. Borden Co.,* 50 F.2d 644, 7 Cir. 1931); a partner in an injured business

partnership (*Coast v. Hunt Oil Co.*, 195 F. 2d 870, 872, 5 Cir. 1952, cert. denied 344 U. S. 836 (1952)); a landlord of an injured lessee (*Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389, aff'd. 113 F. 2d 114, 2 Cir. 1940); a supplier of an injured customer (*Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, D. Mass. 1956); and the owner of a patent licensed to an injured licensee (*Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678, 2 Cir. 1955, cert. denied 350 U.S. 936 (1956)); were all denied recovery. Each one of these plaintiffs had business relationships with the objects of the conspiracy. These plaintiffs could be said to have had some relationship to the "target area." Appellants and their decedents had none.

The "target area" concept is a factor in determining whether there was proximate causation. *Twentieth Century Fox Film Corp. v. Goldwyn, supra,* at p. 220. In no sense can appellants claim that they, their decedent husbands, or their alleged rights to consortium were aimed at or hit by the alleged price fixing conspiracy or that they were in the area of the economy which it could be reasonably foreseen would be affected by any such conspiracy.

A plaintiff in an antitrust action must also allege a causal connection between the violation of the antitrust laws which is alleged and the injury to his business or property. There must be an impact of the antitrust violation on the business or property of the plaintiff.

Keogh v. Chicago and N.W. Ry. Co., 260 U.S. 156, 165, 67 L.Ed. 183 (1922)

Wolfe v. National Lead Company, 225 F.2d 427, 433 (9 Cir. 1955)), cert. den. 350 U.S. 915 (1955)

Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 909 (2 Cir. 1962), cert. den. 369 U.S. 865 (1962)

Northwestern Oil Co. v. Socony Vacuum Oil Co., 138 F.2d 967, 971 (7 Cir. 1943), cert. den. 321 U.S. 792 (1944)

Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 737 (9 Cir. 1959)

In *Talon, Inc. v. Union Slide Fastener, Inc., supra,* this court, at page 736-737, said:

"In addition to establishing that Talon has violated the anti-trust laws, Union before being entitled to award of damages must establish that Talon's violations of the antitrust laws were a proximate cause of injury to it, and must also prove the extent of that injury. As stated by this Court in Flintkote Company v. Lysfjord, 9 Cir., 1957, 246 F. 2d 368, at page 392, certiorari denied 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed. 46: 'We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection beween defendant's wrongful act and some loss of anticipated revenue.' If Union had established with reasonable probability the causal connection between the unlawful acts of Talon and the resultant injury to Union in its property or business, the district court, in the absence of evidence which would have established the amount or extent of damage with reasonable probability, could have made a just and reasonable estimate of damage based on relevant data and could have rendered its verdict accordingly. Bigelow v. R.K.O. Radio Pictures, Inc., 1945, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652. The distinction then is "between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage." *Flintkote Company v. Lysfjord,* supra. (Emphasis by the court)

As stated by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 1930, 282 U.S. 555, at page 562, 51 S.Ct. 248, at page 250, 75 L.Ed.

> 544: '* * * there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. * * *' See also *Eastman Kodak Co. v. Southern Photo Material Co.,* 1926, 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684."

Appellants have failed to meet these requirements. They do not allege facts from which it may be inferred how or in what manner the alleged price fixing conspiracy damaged their business or property or the causal connection between the alleged price fixing and the personal injuries and deaths of appellants' decedents. In fact, it appears that appellants do not actually claim in their complaints that the alleged price fixing conspiracy injured their business or property or that there was a causal connection between the alleged violation and the injury. Instead, appellants rely on collateral matters which might constitute either a breach of the contract between appellees and the United States or fraudulent promises to the United States to perform severally and to use safe equipment. None of these is an act in restraint of trade prohibited by section 1 of the Sherman Act.

In short, as appellants themselves appear to say (App. Br. p. 14), Count III is based on damages arising from the alleged negligence of appellees, not on a restraint of trade under the Sherman Act or injury directly caused to business or property by reason of anything forbidden by section 1 of the Act.

3. THE BUSINESS OR PROPERTY OF APPELLANTS WAS NOT INJURED.

Appellants recognize that the right to consortium is not a "business" but they claim such a right is "property". The District Court concluded that if the right to consortium is a "property right" in Montana, the right is not one that the antitrust laws were intended to protect (R. 67, 267 F. Supp., at page 432).[8] A right to consortium is not property which could be the object of a conspiracy or which could be injured by a conspiracy to restrain trade, monopolize, control markets or discriminate among purchasers *(Apex Hosiery Co. v. Leader, supra,* 310 U. S. at page 512). The court in *Waldron v. British Petroleum Co.,* 231 F. Supp. 72 (S.D. N.Y. 1964) held that a contract right was property and that it was the type of a contract right which was within the area directly and primarily affected by the conspiratorial acts. The contract right there was of the type which was capable of being injured by the prohibited restraints on trade with which defendants were charged. In order to come within the scope of section 4, the business or property must be of the kind to be found in the area which it could be reasonably foreseen would be affected by the conspiracy. *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190, 220 (9 Cir. 1964). To be in the affected area the property must be the kind of property which can be proximately injured by acts forbidden by the antitrust laws. A fixed price cannot directly or proximately cause injuries to a person or death.

Appellants say that the right to consortium is the right of the wife to the support, aid, protection, affection, and society of her husband (App. Br. 13). Appellants also claim damages for alleged injury to these rights under the

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8. Section 4 of the Clayton Act (15 U.S. Code, Sec. 15) refers to "any person who shall be injured in his business or property . . .".

Montana Survival Act and Montana Wrongful Death Act in Count I of their complaints (R. 11, 25, 39, par. 25). Under the Wrongful Death Act, loss of support, aid, protection, affection and society of a deceased spouse are the elements of damage (section 93-2810 R.C.M., 1947; *Mize v. Rocky Mountain Bell Tel. Co.,* 38 Mont. 521, 100 P. 971, 974 (1907)); in other words, the compensable elements are the same.

It thus appears that appellants are not really claiming damage to property. They employ the phrase, but each appellant as survivor actually claims damages for wrongful death and for personal injuries to a deceased husband. Count III is only a restatement of the basic claims for personal injuries to decedents negligently caused and resulting in death.

We have shown that many business and property rights (*supra,* pp. 13-15, 17, 18) are not within the area threatened by an alleged conspiracy in violation of the antitrust laws. Claims for personal injuries and for wrongful death cannot be in any threatened area. They are not trade nor are they in trade. They are not property or the kind of property intended to be protected against restraints of trade in violation of the antitrust laws.

In support of their assertion that industrial safety is one of the social benefits of a competitive economy (App. Br. 6), appellants include in the Appendix to their brief excerpts from trade publications dealing with safety and workmen's compensation insurance (App. Br. Appendix 1a-14a). None of these materials has any bearing on restraints of trade prohibited by section 1 of the Sherman Act. The materials do, however, confirm that appellants in Count III of their complaints are only restating in another form claims against their employer based on negligence for personal injuries and wrongful death as set forth in Count I.

Whether these claims for personal injuries and wrongful death are barred by the Montana Workmen's Compensation Act (R.C.M. 1947, secs. 92-201, 92-204) is still before the District Court. Although the District Court was of the view that no genuine issue of fact was presented with respect to the claims alleged in Counts I and II, the court gave appellants a further opportunity to apprise the court of evidence they may have to avoid the limitation of liability of appellees under the Montana Workmen's Compensation Act (R. 58, 59).

III. Summary Judgment Was Properly Granted.

There is no genuine issue as to any material fact. If the allegations of Count III are assumed to be true, appellants have not stated a claim under the antitrust laws because they have not alleged injury to business or property directly and proximately caused by acts forbidden by the antitrust laws.

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 165; 67 L.Ed. 183 (1922) and cases cited, *supra.*

Moreover, appellants rest on the allegations of their pleadings and this they may not do in the face of the averments in the affidavits of Carroll F. Zapp (R. 87-98). Appellants have not set forth specific facts showing that there is a genuine issue for trial as required by Rule 56(e), *Federal Rules of Civil Procedure.*

Lindsey v. Leavy, 149 F.2d 899, 902 (9 Cir. 1945)

In stating that "Issues of negligence are not ordinarily susceptible of summary judgment" (App. Br. 14), appellants again confirm that the real gist of their claims is negligence and not injury to business or property directly

and proximately caused by acts forbidden by section 1 of the Sherman Act.

The District Court appropriately granted partial judgments dismissing Count III of each of the complaints with prejudice and on the merits (R. 69, 71, 73).

IV. Conclusion.

For the reasons set forth above, the judgments of the District Court should be affirmed.

Dated: December 5, 1967.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert E. Burns

Attorney for Appellees